COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 5 and 6 at the Judiciary Education and Conference Center, Annapolis, Maryland, on October 13, 2006.

Members present:

Linda M. Schuett, Esq., Vice Chair

F. Vernon Boozer, Esq.
Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Hon. James W. Dryden
Harry S. Johnson, Esq.
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Frank M. Kratovil, Esq.
Zakia Mahasa, Esq.
Timothy F. Maloney, Esq.
Hon. Albert J. Matricciani
Robert R. Michael, Esq.
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Debbie L. Potter, Esq.
Larry W. Shipley, Clerk
Hon. William B. Spellbring, Jr.
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Eric Lieberman, Esq., Maryland-Delaware-D.C. Press Association
Caryn Tamber, The Daily Record
Brian L. Zavin, Esq., Office of the Public Defender
Andrea Siegel, The Sun
Paul H. Ethridge, Esq., Chair, Rules of Practice Committee, MSBA
Steven Brownlee, Esq., Maryland Bankers Association
Hon. Dennis M. Sweeney
Elizabeth B. Veronis, Esq.
Sally Rankin, Court Information Officer
Jane Murphy, Esq., Executive Director, MDDC
Michelle Nethercott, Esq.
Professor Lynn McLain, University of Baltimore School of Law

In the Chair’s absence, the Vice Chair convened the meeting.

Agenda Item 1. Consideration of proposed Rules changes pertaining to jury trial implementing Chapter 372, Acts of 2006 (HB 1024) recommended by the Trial, Criminal, General Court Administration, and Attorneys Subcommittees - Amendments to: Rule 2-509 (Jury Trial - Special Costs in First, Second, and Fourth Judicial Circuits), Rule 2-511 (Trial by Jury), Rule 2-512 (Jury Selection), Rule 2-521 (Jury - Review of Evidence -– Communications), Rule 2-522 (Court Decision - Jury Verdict), Rule 4-312 (Jury Selection), Rule 4-313 (Peremptory Challenges), Rule 4-314 (Defense of Not Criminal Responsible), Rule 4-326 (Jury - Review of Evidence - Communications), Rule 4-327 (Verdict - Jury), Rule 4-643 (Subpoena), Rule 5-606 (Competency of Juror as Witness), Rule 16-107 (Court and Jury Terms), Rule 16-1004 (Access to Notice, Administrative, and Business License Records), Appendix: The Maryland Lawyers' Rules of Professional Conduct, Rule 3.5 (Impartiality and Decorum of the Tribunal), and Appendix: Maryland Code of Conduct for Court Interpreters, Canon 3 (Impartiality and Avoidance of Conflict of Interest)

The Vice Chair told the Committee that although the meeting materials state that four individuals are presenting the Rules pertaining to jury trials, the Honorable Dennis M. Sweeney of the Circuit Court for Howard County will present the Rules. The changes to the Rules are designed to address statutory changes made in Chapter 372, Acts of 2006 (HB 1024). Judge Sweeney and Elizabeth B. Veronis, Esq., counsel to the Chief Judge, Court of Appeals, attended several Subcommittee meetings at which these Rules were discussed.

Judge Sweeney explained that the thrust of the amendments is to implement the new law on juries that went into effect on October 1, 2006. Many of the changes to the Rules conform the language to the statutory language. One example is the deletion of the word "petit" and in its place the addition of the word

"trial" modifying the word "jury." Mr. Johnson pointed out that in the version of the statute found in the meeting materials, the definitions begin on page 10. Judge Sweeney said that the statute provides for categories of sworn jurors, but more significantly, it makes no attempt to define what is confidential information concerning jurors. The Rules try to define what information is confidential as the law allows. The Vice Chair suggested that each Rule in the package be presented separately.

Judge Sweeney presented Rule 2-509, Jury Trial -- Special Costs in First, Second, and Fourth Judicial Circuits, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-509 (b) to delete the word "compensation" and to add the words "reimbursement" and "qualified", as follows:

Rule 2-509. JURY TRIAL -- SPECIAL COSTS IN FIRST, SECOND, AND FOURTH JUDICIAL CIRCUITS

. . .

(b) Special Costs Imposed

When a jury trial is removed from the assignment at the initiative of a party for any reason within the 48 hour period, not including Saturdays, Sundays, and holidays, prior to 10:00 a.m. on the date scheduled, an amount equal to the total ~~compensation~~ reimbursement paid to qualified jurors who reported and were not otherwise utilized may be assessed as costs in the action against a party or parties in the discretion of the

court and remitted by the clerk to the county. The County Administrative Judge may waive assessment of these costs for good cause shown.

. . .

Rule 2-509 was accompanied by the following Reporter's Note.

In section (b), the word "reimbursement" is substituted for the former reference to "compensation", to reflect the practice of treating payments as expense reimbursement.

Also in section (b), the word "qualified" is added to modify "jurors" to reflect the addition of a defined term "qualified juror" in Code, Courts Article, §8-101, to distinguish among prospective, qualified, and sworn jurors.

The Vice Chair noted that the statute substitutes the word "reimbursement" for the word "compensation" and adds the word "qualified" before the word "juror." The same changes are made to Rule 2-509. By consensus, the Committee approved the Rule as presented.

Judge Sweeney presented Rule 2-511, Trial by Jury, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-511 to add a cross reference after section (d), as follows:

Rule 2-511. TRIAL BY JURY

(a) Right Preserved

The right of trial by jury as guaranteed by the Maryland Constitution and the Maryland Declaration of Rights or as provided by law shall be preserved to the parties inviolate.

(b) Number of Jurors

The jury shall consist of six persons. With the approval of the court, the parties may agree to accept a verdict from fewer than six jurors if during the trial one or more of the six jurors becomes or is found to be unable or disqualified to perform a juror's duty.

(c) Separation of Jury

The court, either before or after submission of the case to the jury, may permit the jurors to separate or require that they be sequestered.

(d) Advisory Verdicts Disallowed

Issues of fact not triable of right by a jury shall be decided by the court and may not be submitted to a jury for an advisory verdict.

Cross reference: Md. Declaration of Rights, Article 5; Rule 2-325; and Code, Courts Article, §§8-421 (a) and 8-422.

. . .

Rule 2-511 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 2-511 adds to the cross reference a reference to Article 5 of the Maryland Declaration of Rights and §§8-421 (a) and 8-422 of Code, Courts Article.

Judge Sweeney said that a cross reference to the Maryland

Declaration of Rights and to the Courts Article has been added after section (d). By consensus, the Committee approved the Rule as presented.

Judge Sweeney presented Rule 2-512, Jury Selection, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-512 by adding a new subsection (a)(1) and a new cross reference after subsection (a)(1), by adding to and deleting language from subsection (a)(2), by adding a new subsection (a)(3), by adding to and deleting language from section (b), by adding to and deleting language from subsection (c)(1), by adding a new subsection (c)(2), by adding to and deleting language from subsection (d)(1), by renumbering section (e) as subsection (d)(2) with an additional word added to it, by deleting section (f), by renumbering section (g) as section (e), by adding to and deleting language from subsection (e)(1), by adding to and deleting language from subsection (e)(2), by relettering section (i) as section (f), by adding to and deleting language from subsection (f)(1), by adding new subsections (f)(2)and (f)(3), and by making the second sentence of section (i) into section (g) with language changes, as follows:

Rule 2-512. JURY SELECTION

(a) ~~Challenge to the~~ Array and Jury Size

(1) Size

Before trial begins, the judge shall decide the required number of sworn jurors,

including alternates, if any, and decide on the size of the array of qualified jurors needed for selecting the jury.

Cross reference: See Code, Courts Article, §8-420 (b).

(2) Challenge

A party may challenge the array ~~of jurors~~ on the ground that its members were not selected~~, drawn,~~ or summoned according to law or on any other ground that would disqualify the ~~panel~~ array as a whole. A challenge to the array shall be made and determined before any individual qualified juror from that array is examined, except that the ~~court~~ trial judge for good cause may permit it to be made after the jury is sworn but before any evidence is received.

(3) Insufficient Array

If the array is insufficient for jury selection, the trial judge may direct that additional qualified jurors be summoned at random from the qualified juror pool as provided by statute.

(b) ~~Alternate Jurors~~ General Requirements

~~The court may direct that one or more jurors be called and impanelled to sit as alternate jurors. Any juror who, before the time the jury retires to consider its verdict, becomes or is found to be unable or disqualified to perform a juror's duty shall be replaced by an alternate juror in the order of selection. An alternate juror~~ All individuals to be impanelled on the jury shall be ~~drawn~~ selected in the same manner, have the same qualifications, and be subject to the same examination~~, take the same oath, and have the same functions, powers, facilities, and privileges as a juror. An alternate juror who does not replace a juror shall be discharged when the jury retires to consider its verdict~~.

(c) Jury List

(1) Contents

Before the examination of qualified jurors, each party shall be provided with a list ~~of jurors~~ that includes the name, address, age, sex, education, occupation of each qualified juror, ~~and~~ the occupation ~~of spouse~~ of each ~~juror~~ qualified juror's spouse, and ~~any~~ other information, if any, required by ~~the county jury plan~~ rule. ~~When the county jury plan requires the address of a juror, the~~ Unless the trial judge orders otherwise, the address ~~of a juror, the address need~~ shall be limited to the city or town and zip code and shall not include the ~~house~~ street address or box number.

(2) Dissemination

Unless the trial judge orders otherwise, a party may not disseminate the jury list to any other person.

Committee note: A jury commissioner shall provide a copy of the jury list to the trial judge and, with permission of the trial judge, to an other individual such as the courtroom clerk, or court reporter for use in carrying out official duties in connection with a trial. Copies of jury lists so provided are not to be included in the case record but shall be returned to the jury commissioner.

(d) Examination ~~of Jurors~~ and Challenges for Cause

(1) Examination

The ~~court~~ trial judge may permit the parties to conduct an examination of qualified jurors or may ~~itself~~ conduct the examination after considering questions proposed by the parties. If the ~~court~~ trial judge conducts the examination, ~~it~~ the judge may permit the parties to supplement the examination by further inquiry or may ~~itself~~ submit to the qualified jurors additional questions proposed by the parties. The qualified jurors' responses to any examination shall be under oath. ~~Upon~~ On

request of any party, the ~~court~~ trial judge shall direct the clerk to call the roll of the ~~panel~~ array and to request each qualified juror to stand and be identified when called by name.

~~(e) Challenge for Cause~~ (2) Challenge for Cause

A party may challenge an individual qualified juror for cause. A challenge for cause shall be made and determined before the jury is sworn, or thereafter for good cause shown.

~~(f) Additional Jurors~~

~~When the number of jurors of the regular panel may be insufficient to allow for selection of a jury, the court may direct that additional jurors be summoned at random from the qualified jury wheel and thereafter at random in a manner provided by statute.~~

~~(g)~~ (e) ~~Designation of List of Qualified Jurors~~ Peremptory Challenges

(1) Designation of Qualified Jurors; Order of Selection

Before the exercise of peremptory challenges, the ~~court~~ trial judge shall designate from the jury list those ~~jurors~~ individuals who ~~have~~ remain qualified after examination. The number designated shall be sufficient to provide the required number of sworn jurors, ~~and~~ including alternates, if any, ~~to be sworn~~ after allowing for the exercise of peremptory challenges. The ~~court~~ trial judge shall at the same time prescribe the order to be followed in selecting ~~the jurors and alternate jurors~~ individuals from the list.

~~(h)~~ (2) ~~Peremptory Challenges~~ Number; Exercise of Peremptory Challenges

Each party is permitted four peremptory challenges plus one peremptory challenge for each group of three or less ~~alternate jurors~~ alternates to be impanelled.

For purposes of this section, several plaintiffs or several defendants shall be considered as a single party unless the ~~court~~ trial judge determines that adverse or hostile interests between plaintiffs or between defendants justify allowing to each of them separate peremptory challenges not exceeding the number available to a single party. The parties shall simultaneously exercise their peremptory challenges by striking from the list.

~~(i)~~ (f) ~~Impanelling the~~ Impanelled Jury

(1) Impanelling

The ~~jurors and any alternates~~ individuals to be impanelled as sworn jurors, including alternates, if any, shall be called from the qualified jurors remaining on the jury list in the order previously designated by the ~~court~~ trial judge and shall be sworn.

(2) Oath; Functions, Powers, Facilities, and Privileges

All sworn jurors, including alternates, if any, shall take the same oath and, until discharged from jury service, have the same functions, powers, facilities, and privileges.

(3) Discharge of Jury Member

At any time before the jury retires to consider its verdict, the trial judge may replace any jury member whom the trial judge finds to be unable or disqualified to perform jury service with an alternate in the order of selection set under subsection (e)(1). When the jury retires to consider its verdict, the trial judge shall discharge any alternate not needed to replace another jury member.

(g) Foreperson

The ~~court~~ trial judge shall designate a sworn juror as ~~foreman~~ foreperson.

Source: This Rule is derived as follows:

Section (a) is in part derived from former Rules 754 a and ~~is consistent with former~~ Rule 543 c and in part new.

Section (b) is derived from former Rule 751 b and ~~is consistent with~~ former Rule 543 b 3.

Section (c) is new.

Section (d) is derived from former Rules 752, 754 b, and 543 d.

Section (e) is derived from former Rules ~~754 b~~ 753 and 543 a 3 and 4.

Section (f) is ~~consistent with former Rule 543 a 5 and 6~~ new.

Section (g) ~~is new with exception of the last sentence which is derived from former Rule 753 b 1~~ is derived from former Rule 751 d.

~~Section (h) is derived from former Rule 543 a 3 and 4.~~

~~Section (i) is derived from the last sentence of former Rule 753 b 3 and former Rule 751 d.~~

Rule 2-512 was accompanied by the following Reporter's Note.

Subsection (a)(1) is added to state expressly that a trial judge sets the size of the jury to be impanelled and, therefore, the size of the initial array, before jury selection begins. Accordingly, the former first sentence of section (b) is deleted.

Subsection (a)(2) is derived from former section (a), with deletion of the former word "drawn" for consistency with revised Code, Courts Article, Title 8, which reflects the use of computers for selection as opposed to the archaic drawing of numbers from a wheel, and substitution of the word "array" is substituted for the former word "panel", for internal consistency and consistency with revised Code, Courts Article, Title 8.

Subsection (a)(3) is derived from former section (f) with substitution of the term "trial judge" for the former word "court" to avoid the inference that a majority of the bench must concur; substitution of the word "array" for the former words "regular panel" for internal consistency and consistency with revised Code, Courts Article, Title 8; and

substitution of the reference to a "qualified juror pool" for the former reference to a "qualified jury wheel" for consistency with revised Code, Courts Article, Title 8, which reflects the use of computers for selection as opposed to the archaic drawing of numbers from a wheel.

The former second sentence of section (b) is restated as an affirmative statement applicable to all impanelled jurors, including alternates. The word "selected" is substituted for the former word "drawn," for consistency with revised Code, Courts Article, Title 8, which reflects the use of computers for selection, as opposed to the archaic drawing of numbers from a wheel.

Former section (c) is renumbered as subsection (c)(1), with addition of "qualified" to modify "juro[r]" to reflect the addition of a defined term "qualified juror" in Code, Courts Article, §8-101 and to distinguish amongst prospective, qualified, and sworn jurors. Subsection (c)(1) is revised to require the jury list to include an address for a qualified juror but limited to a city or town and zip code to afford qualified jurors in a civil trial with the same protection for identifying information as that afforded to qualified jurors in a criminal trial. *See* Rule 4-312. Additionally, the requirement for additional information is to be set by rule rather than individual jury plan, for consistency with Code, Courts Article, §8-105.

Subsection (c)(2) is added to set forth the manner in which jury lists are to be distributed and protected against dissemination of juror information unnecessarily. The Committee note reflects the practice in some jurisdictions, whereby a jury list is returned to the jury commissioner and, thereby, is subject to Rule 16-1001 *et seq.*

Subsections (d)(1) and (2) are derived from former sections (d) and (e) with addition of the term "qualified" to modify

"juro[r]" to reflect the addition of a defined term "qualified juror" in Code, Courts Article, §8-101 and to distinguish amongst prospective, qualified, and sworn jurors; and substitution of the word "array" for the former words "panel" for internal consistency and consistency with revised Code, Courts Article, Title 8.

Subsection (e)(1) is derived from former section (g), with substitution of references to "individuals" for the former references to "jurors" and "alternate jurors," as these individuals are winnowed from among the "qualified jurors" – as categorized in Code, Courts Article, Title 8 – but may not be sworn as jurors. Accordingly, in subsection (e)(1), reference to "remain[ing] qualified" after examination is substituted for the former reference to "hav[ing] qualified".

Subsection (e)(2) is derived from former section (h).

Subsection (f)(1) is derived from the former first sentence of section (i), with substitution of reference to "individuals" to be impanelled "as sworn jurors" for the former reference to "jurors and any alternates," as these individuals are winnowed from among the "qualified jurors" – as categorized in Code, Courts Article, Title 8 – but are not yet sworn as jurors; and with the addition of "jury" to modify the word "list" for internal consistency.

Subsection (f)(2) is derived from the former third sentence of section (b), as it related to being sworn and serving as a sworn juror.

Subsection (f)(3) is derived from the former second and fourth sentences of section (b), with substitution of the reference to "the trial judge ... find[ing]" for the former reference "becomes or is found," and the passive "shall be discharged," since the judge's ruling is determinative. The substitution also avoids the inference that a majority of the bench must concur.

> Section (g) is derived from the former second sentence of section (i), with substitution of the word “foreperson” for the former word “foreman,” to reflect the Judiciary’s policy to use gender neutral words where practicable.

The Vice Chair pointed out that the added language in subsection (a)(1) that states “... the judge shall decide the required number of sworn jurors ...” needs to be restyled, because it implies that the judge can set any number of jurors. Judge Sweeney commented that this language is not intended to give the judge leeway as to the number of jurors. The Reporter asked if there is leeway as to the number of alternates, and Judge Sweeney replied affirmatively.

Judge Sweeney drew the Committee’s attention to subsection (c)(2). He explained that this is a new section that is intended to keep the jury list of prospective jurors as confidential as possible. The juror information cannot be disseminated beyond the team of lawyers. The Vice Chair noted that this provision only applies to parties. Mr. Brault remarked that before a trial in which there is a wealthy client or a large class action suit involving a large sum of money, lawyers often hire consultants to analyze the potential jury pool from a psychological point of view. Often there is an investigation that produces background information for each potential juror. Mr. Brault added that although he would be satisfied if this type of psychological review is eliminated, other lawyers would not want to see it eliminated.

The Vice Chair asked if dissemination of the list to an agent of a party should be allowed. Judge Sweeney said that it is unclear what the procedures in this area are. Clearly, the information about the jury pool should be given to the party and to counsel, but the question is if it should go beyond this. This raises the issue of whether it is a good idea for jury consultants to be able to investigate prospective jurors in advance of the trial. He commented that he was not sure how to control this. When the provision was drafted, the intent was to keep juror information within the plaintiff or defense team only. The current Rule allows the psychological consultants to which Mr. Brault referred. The protection is that the lawyer is still ultimately responsible, since the lawyer hired the jury consultant. Mr. Johnson pointed out that this issue had been discussed by the Subcommittee. The court can control the conduct of anyone within the control of the lawyer, but if the jury list is given to the media, this is not within the control of the party or the court.

Mr. Kratovil suggested that the Rule could require the court to allow the release of juror information to agents of the parties. The Vice Chair said that it seems to be the sense of the Committee that juror information cannot be disseminated to anyone other than the parties, their counsel, and agents. Mr. Bowen remarked that he was not sure that lawyers can get the juror list in advance of the trial. Other rules prevent the jury commissioner from giving out juror information. Mr. Johnson

responded that in some cases, such as the consolidated asbestos cases, the jury selection process may take up to two months. The prospective jurors fill out questionnaires well in advance of the trial date. Complex cases are an exception to the ordinary rule. Mr Johnson said that he has had other experiences with an extended jury selection process. The Vice Chair added that the selection process for a jury may begin on Friday, and during the weekend, the consultants may investigate the jury pool. Subsection (c)(2) is worded ambiguously.

Judge Sweeney observed that if a lawyer hires someone to analyze the jury, the lawyer is ultimately responsible. This provision is intended to control the situation where someone asks a lawyer to look at or get a copy of the jury list, and the lawyer complies. Nothing in the current Rule prohibits this. What arises frequently is the fact that jurors are reluctant to provide information, because they are concerned as to who will have access to it. They are worried about identity theft and personal information being disseminated. The law is not clear as to how they are protected. Judge Sweeney said that he tells jurors that the information concerning them is kept as confidential as the Rules allow. Rule 16-1004, Access to Notice, Administrative, and Business License Records, addresses access to the information that is in the hands of the jury commissioner. Only parties, counsel, and the judge may have access to the jury information until the jury is sworn. Then only the names of the jurors are accessible. The Vice Chair noted that the Court of

Appeals may ask if the changes to the Rules are to protect the safety of the jurors or to protect their privacy. Judge Sweeney responded that the changes to the Rules protect both. In parts of the State, it is difficult to get jurors to participate. People refuse to fill out the juror questionnaires, or they leave some questions blank. When they are asked why they are refusing, they answer that they are concerned as to where the information will be transmitted. Current law does not necessarily guarantee confidentiality of the information.

Mr. Brault inquired as to what the access is to the information on the jury commissioner's computer. Judge Sweeney replied that it can be argued that under the current Rules, this information is accessible. Under the proposed amendment, the information is confidential. Mr. Brault pointed out that the information about the jury list of the array is addressed, but there is no comparable rule regarding jurors who have been selected to hear a case. Judge Sweeney noted that subsection (b)(2)(B) of Rule 16-1004 provides that a custodian may disclose only the names of the sworn jurors. There are rare cases, although he has never seen one in Maryland, where there is an anonymous jury. The Vice Chair commented that when the Rule provides that the custodian shall deny inspection of the jury list, it should include both the large list of potential jurors and the list of impaneled jurors. Mr. Brault commented that clients and insurers want the names, addresses, and occupations of jurors. Is this given out in every county? Mr. Kratovil

answered that Queen Anne's County does not provide this.

Mr. Brault said that the Court of Appeals has recognized the tripartite relationship between the insurer, the insured, and the lawyer. Both the insured and insurer are interested in the jury. The Vice Chair stated that the Style Subcommittee will make sure that subsection (c)(2) of Rule 2-512 provides for dissemination of the jury list to the parties, counsel, and the people under the control of the parties, but not to a third party who is outside of the litigation. Judge Dryden suggested that the Rule could require counsel to submit to the court to whom he or she intends to disseminate the jury list. Mr. Johnson asked whether, even if this is done, people will want to serve as jurors. Judge Dryden responded that under the current system, counsel can give the jury list to whomever he or she wants. Judge Sweeney said that there is an economic factor as to who has a team to research the jury. If disclosure of the team analyzing the jury is required, lawyers may feel this impinges upon attorney work product. Judge Dryden remarked that in a criminal case, if defense counsel gives the list to others, jurors often become fearful. Judge Sweeney observed that the procedure walks a tightrope. It is important that jurors be protected, but advocacy should not be hampered, and there should not be any interference in the attorney-client relationship. He said that he had not heard of any lawyers acting abusively, but if this should happen, this can be dealt with by the trial judge and Bar Counsel. Mr. Sykes suggested that there could be a duty imposed

on the party to require anyone to whom the list is disseminated not to disseminate it further.

Mr. Johnson commented that after trials, especially in continuing litigation, such as asbestos litigation, jury verdicts are often analyzed. He questioned as to whether this Rule would preclude a civil defendant from giving the jury list to a company for analysis or preclude academics from looking at verdicts to see what the jurors thought. Judge Sweeney replied that the Rule would exclude this. Under the Maryland Public Information Act, Code, State Government Article, §§10-611 through 10-626, the custodian of records may provide access to otherwise confidential information for research purposes. If a researcher goes to court to ask to see this information for a study, this Rule could prevent the court as the custodian of records from providing access to the information.

Mr. Brault noted that he likes neither losing a case nor an insurance company's investigation as to why the case was lost, but the latter happens whenever the former has occurred. Sophisticated insurers and corporations must have the list of jurors. The Vice Chair inquired as to who gives them this list. Mr. Brault answered that he gives the jury list to the insurance company at the beginning of the trial. At the end of the first day, he has to report about the jury to the insurance company. If a case with a large monetary value is lost, there may be a 20-page analysis of what the jurors thought of the attorneys and witnesses.

Mr. Johnson remarked that some judges allow post-trial interviews of jurors, especially in major cases. He asked if changing subsection (c)(2) would be a substantive or a style change. Mr. Kratovil inquired as to whether the jury list could be disseminated to an agent of a party pursuant to the Rule. The Vice Chair replied that as the Rule currently is drafted, the agent would not be entitled to the list -- the agent is hired by the insurance company, and this relationship is too attenuated. Mr. Brault noted that there are many reasons why jurors are interviewed. It is important in massive civil litigation that the insurers have an opportunity to analyze the case. The Rule should not exclude interviews with jurors after the trial. The Vice Chair pointed out that this provision is tied to the Rules pertaining to access to court records. The Committee should recommend to the Court of Appeals whether or not juror interviews should be provided for.

Mr. Shipley observed that the Committee note after subsection (c)(2) indicates that copies of jury lists are not included in the case record. He asked how this would be handled if the case is appealed on the issue of the jury array or jury selection, and the list is not in the file. Judge Sweeney responded that practices vary around the State. Some jurisdictions put the jury list in the case file, and others, including Howard County, give the list back to the jury commissioner. If the list is needed for an appeal, the parties have a copy of the list available. The Council has been

encouraging jurisdictions not to put the list in the court file. He questioned as to the basis for putting the list under seal. Mr. Shipley replied that this would be for confidentiality reasons.

Judge Matricciani commented that the concerns of jurors are different for civil and criminal cases. One identified fear is that jurors' personal information is getting out. Changing the Rule may cure both evils at the same time, but it may be difficult to draft. Judge Sweeney noted that jurors often do not know whether the case they have been chosen for is criminal or civil, and they are concerned in both types of cases. The media may create unrealistic fears creating a detriment to getting jurors to serve. The Vice Chair expressed her concern about the jurors' perception, even if it is not based on real data. Judge Sweeney said jurors could be told that their information is kept as confidential as possible as opposed to telling them that their fears are overblown and there is a guarantee that nothing will happen to them. The Vice Chair questioned whether keeping juror information from the public is on constitutionally firm ground. Judge Sweeney responded that *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984), held that the public generally is entitled to access to the names of jurors unless there is an overriding interest based on findings that closure is essential to promote justice. However, there should not be access to the jurors' addresses or the occupation of their

spouses. Since the public cannot get this information about judges, jurors should be protected similarly.

Mr. Kratovil suggested that a distinction be made between the information on the jurors selected for a particular case which can be disseminated and information on the array that may not be of interest. The Vice Chair commented that for both the array and the selected jurors, the Rule should clarify that only the names of jurors should be disseminated. Master Mahasa pointed out that once a name is available, the address in the telephone book would be accessible. Judge Sweeney responded that the Rule does not address the concept of the anonymous jury. The procedure is for the court to hold a hearing and make findings on the issue of whether to release juror information. Rule 16-1004 (b)(2)(B) provides that if the trial judge orders otherwise, a custodian may not disclose the names of jurors. Judge Matricciani remarked that during *voir dire*, if a juror has problems, it is difficult to maintain anonymity. The Vice Chair stated that the Subcommittee will have to address these issues. Rule 2-512 will be remanded to the Trial Subcommittee. Judge Sweeney noted that section (c), Jury List, of Rules 2-512 and 4-312 should be looked at together.

Judge Sweeney presented Rule 2-521, Jury–-Review of Evidence --Communications, for the Committee's consideration.

AMEND Rule 2-521 by deleting language from section (a), by adding to section (a) the word "sworn" to modify the word "juror" and language to indicate that alternates are included during trial and deliberations, and by adding the word "sworn" to modify the word "juror" in section (b), as follows:

Rule 2-521. JURY - REVIEW OF EVIDENCE - COMMUNICATIONS

(a) Jurors' Notes

The court may, and ~~upon~~ on request of any party shall, provide paper notepads for use by sworn jurors, including alternates, if any, during trial and deliberations. The court shall maintain control over the ~~jurors'~~ notes during the trial and promptly destroy the ~~jurors'~~ notes after the trial. ~~A juror's notes~~ Notes may not be reviewed or relied upon for any purpose by any person other than the sworn juror. If a sworn juror is unable to use a notepad because of a disability, the court shall provide a reasonable accommodation.

(b) Items Taken to Jury Room

~~Jurors~~ Sworn jurors may take their notes with them when they retire for deliberation. Unless the court for good cause orders otherwise, the jury may also take exhibits that have been admitted in evidence, except that a deposition may not be taken into the jury room without the agreement of all parties and consent of the court. Written or electronically recorded instructions may be taken into the jury room only with the permission of the court.

Cross reference: See Rule 5-802.1 (e).

. . .

Rule 2-521 was accompanied by the following Reporter's Note.

In sections (a) and (b), the word

"sworn" is added to modify "juror[s]" to distinguish amongst prospective, qualified, and sworn jurors.

In section (a), the phrase "including alternates, if any" is added to reflect that Rule 2-512 (b) requires an alternate to "take the same oath" as other sworn jurors.

Judge Sweeney told the Committee that the changes are technical to conform to the legislation. By consensus, the Committee approved the Rule as presented.

Judge Sweeney presented Rule 2-522, Court Decision - Jury Verdict, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE — CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-522 by deleting language from section (b), by adding the words "jury or stated majority" in place of the phrase "required number of jurors," and by making stylistic changes, as follows:

Rule 2-522. COURT DECISION - JURY VERDICT

. . .

(b) Verdict

The verdict of a jury shall be unanimous unless the parties stipulate at any time that a verdict or a finding of a stated majority ~~of the jurors~~ shall be taken as the verdict or finding of the jury. The verdict shall be returned in open court. ~~Upon the~~ On request of a party or ~~upon~~ on the court's own initiative, the jury shall be polled before it is discharged. If the poll discloses that

the ~~required number of jurors have~~ jury, or stated majority, has not concurred in the verdict, the court may direct the jury to retire for further deliberation or may discharge the jury.

. . .

Rule 2-522 was accompanied by the following Reporter's Note.

In section (b), reference to a "jury, or stated majority" is substituted for the former reference to "jurors", and the former phrase "of the jurors" is deleted, to avoid the awkwardness of the term "sworn juror" otherwise used throughout these rules.

Judge Sweeney explained that the Rule contains only minor changes to conform to the legislation. By consensus, the Committee approved the Rule as presented.

Judge Sweeney presented Rule 4-312, Jury Selection, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-312 by adding a new subsection (a)(1) and a new cross reference after subsection (a)(1), by adding to and deleting language from subsection (a)(2), by adding a new subsection (a)(3), by adding to and deleting language from section (b), by adding to and deleting language from subsection (c)(1), by adding a new subsection (c)(2), by adding to and deleting language from subsection (d)(1), by renumbering section (e) as subsection (d)(2) with an additional word added to it, by deleting section (f), by renumbering section (g) as section (e), by adding to and deleting language from section (e), by relettering section (h) as section (f), by adding to and deleting language from subsection (f)(1), by

adding new subsections (f)(2)and (f)(3), and by making the second sentence of section (h) into section (g) with language changes, as follows:

Rule 4-312. JURY SELECTION

(a) ~~Challenge to the~~ Array and Jury Size

(1) Size

Before trial begins, the trial judge shall decide the required number of sworn jurors, including alternates, if any, and decide on the size of the array of qualified jurors needed for selecting the jury.
Cross reference: See Code, Courts Article, §8-420 (b) and Code, Criminal Law Article, §2-303 (d).

(2) Challenge

A party may challenge the array ~~of jurors~~ on the ground that its members were not selected~~, drawn,~~ or summoned according to law or on any other ground that would disqualify the ~~panel~~ array as a whole. A challenge to the array shall be made and determined before any individual qualified juror from that array is examined, except that the ~~court~~ trial judge for good cause may permit it to be made after the jury is sworn but before any evidence is received.

(3) Insufficient Array

If the array is insufficient for jury selection, the trial judge may direct that additional qualified jurors be summoned at random from the qualified juror pool as provided by statute.

(b) ~~Alternate Jurors~~ General Requirements

~~(1) Generally~~

~~An alternate juror~~ All individuals to be impanelled on the jury shall be ~~drawn~~ selected in the same manner, have the same qualifications, and be subject to the same

examination~~, take the same oath, and have the same functions, powers, facilities, and privileges as a juror~~.

~~(2) Capital Cases~~

~~In cases in which the death penalty may be imposed, the court shall appoint and retain alternate jurors as required by Code, Criminal Law Article, §2-303 (d).~~

~~(3) Non-capital Cases~~

~~In all other cases, the court may direct that one or more jurors be called and impanelled to sit as alternate jurors. Any juror who, before the time the jury retires to consider its verdict, becomes or is found to be unable or disqualified to perform a juror's duty, shall be replaced by an alternate juror in the order of selection. An alternate juror who does not replace a juror shall be discharged when the jury retires to consider its verdict.~~

(c) Jury List

(1) Contents

Before the examination of qualified jurors, each party shall be provided with a list ~~of jurors~~ that includes the name, address, age, sex, education, and occupation of each qualified juror, the occupation of each qualified juror's spouse, and ~~any~~ other information, if any, required by ~~the county jury plan~~ rule. ~~When the county jury plan requires the address of a juror,~~ Unless the trial judge orders otherwise, the address shall be limited to the city or town and zip code and shall not include the ~~juror's~~ street address or box number~~, unless otherwise ordered by the court~~.

(2) Dissemination

Unless the trial judge orders otherwise, a party may not disseminate the jury list to any other person.

Committee note: A jury commissioner shall

provide a copy of the jury list to the trial judge and, with permission of the trial judge, to any other individual such as the courtroom clerk or court reporter for use in carrying out official duties in connection with a trial. Copies of jury lists so provided are not to be included in the case record but shall be returned to the jury commissioner.

(d) Examination ~~of Jurors~~ and Challenges for Cause

(1) Examination

The ~~court~~ trial judge may permit the parties to conduct an examination of ~~prospective~~ qualified jurors or may ~~itself~~ conduct the examination after considering questions proposed by the parties. If the ~~court~~ trial judge conducts the examination, ~~it~~ the judge may permit the parties to supplement the examination by further inquiry or may ~~itself~~ submit to the qualified jurors additional questions proposed by the parties. The qualified jurors' responses to any examination shall be under oath. ~~Upon~~ On request of any party, the ~~court~~ trial judge shall direct the clerk to call the roll of the ~~panel~~ array and to request each qualified juror to stand and be identified when called by name.

~~(e)~~ (2) Challenges for Cause

A party may challenge an individual qualified juror for cause. A challenge for cause shall be made and determined before the jury is sworn, or thereafter for good cause shown.

~~(f) Additional Jurors~~

~~When the number of jurors of the regular panel may be insufficient to allow for selection of a jury, the court may direct that additional jurors be summoned at random from the qualified jury wheel and thereafter at random in a manner provided by statute.~~

~~(g)~~ (e) ~~Designation of List of Qualified~~

~~Jurors~~ Peremptory Challenges

Before the exercise of peremptory challenges, the ~~court~~ trial judge shall designate from the jury list those ~~jurors~~ individuals who ~~have~~ remain qualified after examination. The number designated shall be sufficient to provide the required number of sworn jurors, including ~~and~~ alternates ~~to be sworn~~ if any, after allowing for the exercise of peremptory challenges pursuant to Rule 4-313. The ~~court~~ trial judge shall at the same time prescribe the order to be followed in selecting ~~the jurors and alternate jurors~~ individuals from the list.

~~(h)~~ (f) ~~Impanelling the~~ Impanelled Jury

(1) Impanelling

The ~~jurors and any alternates~~ individuals to be impanelled as sworn jurors, including alternates if any, shall be called from the qualified jurors remaining on the jury list in the order previously designated by the ~~court~~ trial judge and shall be sworn.

(2) Oath; Functions, Powers, Facilities, and Privileges

All sworn jurors, including alternates if any, shall take the same oath and, until discharged from jury service, have the same functions, powers, facilities, and privileges.

(3) Discharge of Jury Member

At any time before the jury retires to consider its verdict, the trial judge may replace any jury member whom the trial judge finds to be unable or disqualified to perform jury service with an alternate in the order of selection set under section (e). When the jury retires to consider its verdict, the trial judge shall discharge any alternate not needed to replace another jury member.

(g) Foreperson

The ~~court~~ trial judge shall designate

a sworn juror as ~~foreman~~ foreperson.

Source: This Rule is derived as follows:
Section (a) is in part derived from former Rule 754 a and in part new.
Section (b) is derived from former Rule 751 b.
Section (c) is new.
Section (d) is derived from former Rules 752 and 754 b.
Section (e) is derived from former Rule ~~754 b~~ 753.
Section (f) is new.
~~Section (g) is derived from former Rule 753 b 1.~~
~~Section (h) is derived from former Rule 751 c and d.~~
Section (g) is derived from former Rule 751 d.

Rule 4-312 was accompanied by the following Reporter's Note.

Subsection (a)(1) is added to state expressly that a trial judge sets the size of the jury to be impanelled and, therefore, the size of the initial array, before jury selection begins. Accordingly, former subsection (b)(2) and the first sentence of subsection (b)(3) is deleted, with the addition of the cross references.

Subsection (a)(2) is derived from former section (a), with deletion of the former word "drawn" for consistency with revised Code, Courts Article, Title 8, which reflects the use of computers for selection as opposed to the archaic drawing of numbers from a wheel; substitution of the word "array" for the former word "panel," for internal consistency and consistency with revised Code, Courts Article, Title 8; addition of the word "qualified" to modify "juror" to reflect the addition of a defined term "qualified juror" in Code, Courts Article, §8-101 and to distinguish amongst prospective, qualified, and sworn jurors; and substitution of the term "trial judge" for the former word "court" to avoid the inference that a majority of the bench must concur.

Subsection (a)(3) is derived from former section (f), with substitution of the word "array" for the former words "regular panel" for internal consistency and consistency with revised Code, Courts Article, Title 8; substitution of the term "trial judge" for the former word "court" to avoid the inference that a majority of the bench must concur; and substitution of the reference to a "qualified juror pool" for the former reference to a "qualified jury wheel" for consistency with revised Code, Courts Article, Title 8, which reflects the use of computers for selection as opposed to the archaic drawing of numbers from a wheel.

Former subsection (b)(1), except as it related to the oath and powers, is renumbered as section (b) and is restated as an affirmative statement applicable to all impanelled jurors, including alternates. The word "selected" is substituted for the former word "drawn", for consistency with revised Code, Courts Article, Title 8, which reflects the use of computers for selection, as opposed to the archaic drawing of numbers from a wheel.

Former section (c) is renumbered as subsection (c)(1), with addition of "qualified" to modify "juro[r]" to reflect the addition of a defined term "qualified juror" in Code, Courts Article, §8-101 and to distinguish amongst prospective, qualified, and sworn jurors. Subsection (c)(1) is revised to require the jury list to include an address for a qualified juror with the current limitation as to a city or town and zip code. Additionally, the requirement for additional information is to be set by rule rather than individual jury plan, for consistency with Code, Courts Article, §8-105.

Subsection (c)(2) is added to set forth the manner in which jury lists are to be distributed and protected against dissemination of juror information unnecessarily. The Committee note reflects the practice in some jurisdictions, whereby a jury list is returned to the jury

commissioner and, thereby, is subject to Rule 16-1001 *et seq.*

Subsections (d)(1) and (2) are derived from former sections (d) and (e), with substitution of the terms "trial judge" and "judge" for the former words "court" and "it," and deletion of "itself," to avoid the inference that a majority of the bench must concur; addition of the term "qualified" to modify "juro[r]" to reflect the addition of a defined term "qualified juror" in Code, Courts Article, §8-101 and to distinguish amongst prospective, qualified, and sworn jurors; and substitution of the word "array" for the former word "panel" for internal consistency and consistency with revised Code, Courts Article, Title 8.

Section (e) is derived from former section (g), with substitution of the term "trial judge" for the former word "court" to avoid the inference that a majority of the bench must concur and substitution of references to "individuals" for the former references to "jurors" and "alternate jurors", as these individuals are winnowed from among the "qualified jurors" – as categorized in Code, Courts Article, Title 8 – but are not yet sworn as jurors. Accordingly, in section (e), reference to "remain[ing] qualified" after examination is substituted for the former reference to "hav[ing] qualified."

Subsection (f)(1) is derived from the former first sentence of section (h), with substitution of the reference to "individuals" to be impanelled "as sworn jurors" for the former reference to "jurors and any alternates", as these individuals are winnowed from among the "qualified jurors" – as categorized in Code, Courts Article, Title 8 – but are not yet sworn as jurors; and with the addition of "jury" to modify the word "list" for internal consistency.

Subsection (f)(2) is derived from the former subsection (b)(1), as it related to being sworn and serving as a sworn juror.

Subsection (f)(3) is derived from the former second and third sentences of subsection (b)(3), with substitution of the reference to "the trial judge ... find[ing]" for the former reference "becomes or is found," and the passive "shall be discharged," since the judge's ruling is determinative. The substitution also avoids the inference that a majority of the bench must concur.

Section (g) is derived from the former second sentence of section (h), with substitution of the term "trial judge" for the former word "court" to avoid the inference that a majority of the bench must concur; addition of the word "sworn" to modify "juror" to distinguish amongst prospective, qualified, and sworn jurors in accordance with revised Code, Courts Article, Title 8; and substitution of the word "foreperson" for the former word "foreman," to reflect the Judiciary's policy to use gender neutral words where practicable.

Judge Sweeney said that this Rule would go back to the Criminal Subcommittee to address the issues already discussed pertaining to Rule 2-512.

Judge Sweeney presented Rule 4-313, Peremptory Challenges, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-313 by adding the word "qualified" to modify the word "juror" in subsections (b)(1) and (b)(3), as follows:

Rule 4-313. PEREMPTORY CHALLENGES

. . .

(b) Exercise of Challenges

(1) By Alternating Challenges

On request of any party for alternating challenges, the clerk shall call each qualified juror individually in the order previously designated by the court. When the first qualified juror is called, the State shall indicate first whether that qualified juror is challenged or accepted. When the second qualified juror is called, the defendant shall indicate first whether that qualified juror is challenged or accepted. When the third qualified juror is called, the State shall again indicate first whether that qualified juror is challenged or accepted, and the selection of a jury shall continue with challenges being exercised alternately in this fashion until the jury has been selected.

(2) By Simultaneous Striking from a List

If no request is made for alternating challenges, each party shall exercise its challenges simultaneously by striking names from a copy of the jury list.

(3) Remaining Challenges

After the required number of qualified jurors has been called, a party may exercise any remaining peremptory challenges to which the party is entitled at any time before the jury is sworn, except that no challenge to the first 12 qualified jurors shall be permitted after the first alternate juror is called.

. . .

Rule 4-313 was accompanied by the following Reporter's Note.

In subsection (b)(1) and (3), the word "qualified" is added to modify "juro[r]" to reflect the addition of a defined term "qualified juror" in Code, Courts Article,

§8-101, to distinguish among prospective, qualified, and sworn jurors.

Judge Sweeney noted that the changes to Rule 4-313 were minor changes to conform to the legislation. By consensus, the Committee approved the Rule as presented.

Judge Sweeney presented Rule 4-314, Defense of Not Criminally Responsible, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-314 by changing the word "prospective" to the word "qualified" in subsection (b)(3), as follows:

Rule 4-314. DEFENSE OF NOT CRIMINALLY RESPONSIBLE

. . .

(b) Procedure for Bifurcated Trial

(1) Generally

For purposes of this Rule, a bifurcated trial is a single continuous trial in two stages.

(2) Sequence

The issue of guilt shall be tried first. The issue of criminal responsibility shall be tried as soon as practicable after the jury returns a verdict of guilty on any charge. The trial shall not be recessed except for good cause shown.

(3) Examination of Jurors

The court shall inform ~~prospective~~ qualified jurors before examining them pursuant to Rule 4-312 (d) that the issues of guilt or innocence and whether, if guilty, the defendant is criminally responsible will be tried in two stages. The examination of ~~prospective~~ qualified jurors shall encompass all issues raised.

. . .

Rule 4-314 was accompanied by the following Reporter's Note.

In subsection (b)(3), the word "qualified" is substituted for the former word "prospective", to reflect the addition of defined terms "prospective juror" and "qualified juror" in Code, Courts Article, §8-101.

Judge Sweeney explained that the changes to the Rule were conforming changes to the legislation. By consensus, the Committee approved the Rule as presented.

Judge Sweeney presented Rule 4-326, Jury - Review of Evidence - Communications, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-326 by deleting language from section (a), by adding the word "sworn" to modify the words "juror" and "jurors," by adding language referring to alternates and by making stylistic changes in section (a), and by adding the word "sworn" to modify the word "jurors" and by making stylistic changes to section (b), as follows:

Rule 4-326. JURY - REVIEW OF EVIDENCE - COMMUNICATIONS

(a) Jurors' Notes

The court may, and ~~upon~~ on request of any party shall, provide paper notepads for use by sworn jurors, including alternates, if any, during trial and deliberations. The court shall maintain control over the ~~jurors'~~ notes during the trial and promptly destroy the ~~jurors'~~ notes after the trial. ~~A juror's notes~~ Notes may not be reviewed or relied upon for any purpose by any person other than the sworn juror. If a sworn juror is unable to use a notepad because of a disability, the court shall provide a reasonable accommodation.

(b) Items Taken to Jury Room

~~Jurors~~ Sworn jurors may take their notes with them when they retire for deliberation. Unless the court for good cause orders otherwise, the jury may also take the charging document and exhibits ~~which~~ that have been admitted ~~into~~ in evidence, except that a deposition may not be taken into the jury room without the agreement of all parties and the consent of the court. Electronically recorded instructions or oral instructions reduced to writing may be taken into the jury room only with the permission of the court. On request of a party or on the court's own initiative, the charging documents shall reflect only those charges on which the jury is to deliberate. The court may impose safeguards for the preservation of the exhibits and the safety of the ~~jurors~~ jury.

Cross reference: See Rule 5-802.1 (e).

. . .

Rule 4-326 was accompanied by the following Reporter's Note.

In sections (a) and (b), the word "sworn" is added to modify "juror[s]" to distinguish among prospective, qualified, and sworn jurors. Accordingly, in section (b), the word "jury" is substituted for the former

word “jurors” to avoid awkward repetition of “sworn jurors”.

In section (a), the phrase “including alternates, if any” is added to reflect that Rule 4-312 (b)(1) requires an alternate to “take the same oath” as other sworn jurors.

Judge Sweeney told the Committee that the changes to Rule 4-326 conform to the legislation. By consensus, the Committee approved the Rule as presented.

Judge Sweeney presented Rule 4-327, Verdict - Jury, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-327 by changing the word “foreman” to the word “foreperson” in section (a) and by adding the word “sworn” to modify the word “jurors” in section (e), as follows:

Rule 4-327. VERDICT - JURY

(a) Return

The verdict of a jury shall be unanimous and shall be returned in open court.

(b) Sealed Verdict

With the consent of all parties, the court may authorize the rendition of a sealed verdict during a temporary adjournment of court. A sealed verdict shall be in writing and shall be signed by each member of the jury. It shall be sealed in an envelope by the ~~foreman~~ foreperson of the jury who shall

write on the outside of the envelope "Verdict Case No. ....." "State of Maryland vs. ....." and deliver the envelope to the clerk. The jury shall not be discharged, but the clerk shall permit the jury to separate until the court is again in session at which time the jury shall be called and the verdict opened and received as other verdicts.

. . .

(e) Poll of Jury

On request of a party or on the court's own initiative, the jury shall be polled after it has returned a verdict and before it is discharged. If the sworn jurors do not unanimously concur in the verdict, the court may direct the jury to retire for further deliberation, or may discharge the jury if satisfied that a unanimous verdict cannot be reached.

. . .

Rule 4-327 was accompanied by the following Reporter's Note.

In section (b), the word "foreperson" is substituted for the former word "foreman", to reflect the Judiciary's policy to use gender neutral words where practicable.

In section (e), the word "sworn" is added to modify "jurors" to distinguish among prospective, qualified, and sworn jurors.

Judge Sweeney explained that the changes to the Rule conform to the legislation. By consensus, the Committee approved the Rule as presented.

Judge Sweeney presented Rule 4-643, Subpoena, for the Committee's consideration.

TITLE 4 - CRIMINAL CAUSES

CHAPTER 600 - CRIMINAL INVESTIGATIONS AND

MISCELLANEOUS PROVISIONS

AMEND Rule 4-643 to change the word "foreman" to the word "foreperson" in section (a), as follows:

Rule 4-643. SUBPOENA

(a) To Appear Before the Grand Jury

Any subpoena to appear before the grand jury shall be issued: (1) by the clerk of a circuit court on request of the State's Attorney or the grand jury; or (2) by the grand jury through its ~~foreman~~ foreperson or deputy ~~foreman~~ foreperson. The subpoena shall contain the information required by Rule 4-266 (a).

(b) Enforcement - Protective Order

A subpoena to appear before the grand jury or pursuant to Article 10, §39A is enforceable only in circuit court in the manner set forth in Rule 4-266 (d) and the witness or a person asserting a privilege to prevent disclosure by the witness may apply for a protective order pursuant to Rule 4-266 (c).

Source: This Rule is new.

Rule 4-643 was accompanied by the following Reporter's Note.

In section (a), the word "foreperson" is substituted for the former word "foreman", to reflect the Judiciary's policy to use gender neutral words where practicable.

Judge Sweeney said that the change to the Rule is the same as for the previous Rule. By consensus, the Committee approved

the Rule as presented.

Judge Sweeney presented Rule 5-606, Competency of Juror as Witness, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 600 - WITNESSES

AMEND Rule 5-606 by adding the word "sworn" to modify the word "juror" in section (a) and subsections (b)(1) and (b)(2), by deleting language from subsection (b)(3) and making style changes, and by changing the word "petit" to the word "trial" and adding the word "trial" to modify the word "jury" in section (c), as follows:

Rule 5-606. COMPETENCY OF JUROR AS WITNESS

(a) At the Trial

A member of a jury may not testify as a witness before that jury in the trial of the case in which the sworn juror is sitting. If the sworn juror is called to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into Validity of Verdict

(1) In any inquiry into the validity of a verdict, a sworn juror may not testify as to (A) any matter or statement occurring during the course of the jury's deliberations, (B) the effect of anything upon that or any other sworn juror's mind or emotions as influencing the sworn juror to assent or dissent from the verdict, or (C) the sworn juror's mental processes in connection with the verdict.

(2) A sworn juror's affidavit or

evidence of any statement by the sworn juror concerning a matter about which the sworn juror would be precluded from testifying may not be received for these purposes.

(3) ~~A juror's notes~~ Notes made ~~in accordance with~~ under Rule 2-521 (a) or Rule 4-326 (a) may not be used to impeach a verdict.

(c) "Verdict" Defined

For purposes of this Rule, "verdict" means (1) a verdict returned by a ~~petit~~ trial jury or (2) a sentence returned by a trial jury in a sentencing proceeding conducted pursuant to Code, Criminal Law Article, §2-303 or §2-304.

Committee note: This Rule does not address or affect the secrecy of grand jury proceedings.

Source: This Rule is derived in part from F.R.Ev. 606.

Rule 5-606 was accompanied by the following Reporter's Note.

In sections (a) and (b), the word "sworn" is added to modify "jurors" to distinguish among prospective, qualified, and sworn jurors.

In subsection (b)(3), the word "under" is substituted for the former phrase "in accordance with" to cover all notes whether made in accordance with or contravention of the referenced rules.

In section (c), reference to a "trial" jury is substituted for the former reference to a "petit" jury, in accordance with the Council on Jury Use and Management's preference for language more understandable to the public.

Judge Sweeney explained that the changes to this Rule conform to the legislation. By consensus, the Committee approved

the Rule as presented.

Judge Sweeney presented Rule 16-107, Court and Jury Terms, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 100 - COURT ADMINISTRATIVE STRUCTURE, JUDICIAL DUTIES, ETC.

AMEND Rule 16-107 to delete the tagline from section a. and to delete section b., as follows:

Rule 16-107. COURT AND JURY TERMS

~~a. Term of Court.~~

For accounting and statistical reporting purposes, each circuit court shall hold a single term each year beginning on July 1 and ending on the following June 30.

~~b. Term of Jury.~~

~~The County Administrative Judge shall set the terms of the petit and grand juries for that county in the juror selection plan authorized by Code, Courts Article, §8-201.~~

Source: This Rule is derived from former Rule 1206.

Rule 16-107 was accompanied by the following Reporter's Note.

Former section b is deleted as inaccurate as the circuit court, rather than the County Administrative Judge, adopts, and modifies, the jury plan, and Code, Courts Article, §8-207 (a) provides for the plan to

specify intervals for creation of juror pools – rather than “terms”.

Judge Sweeney said that the language “term of court” and “term of jury” is no longer correct, because the circuit court, not the County Administrative Judge, adopts and modifies the jury plan. Code, Courts Article, §8-207 (a) provides that the plan specify intervals for creation of juror pools, rather than “terms.” Judge Norton pointed out that the title of the Rule is incorrect, and the Vice Chair observed that the Rule refers to a “single term.” The title of the Rule should be changed to “Single Term of Court.” By consensus, the Committee approved the Rule as amended.

Judge Sweeney presented Rule 16-1004, Access to Notice, Administrative, and Business License Records, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 1000 - ACCESS TO COURT RECORDS

AMEND Rule 16-1004 to delete language from subsection (b)(2)(A); to add language providing for a certain exception, to change the statutory references, and to add an exception for jury lists in subsection (b)(2)(A); to delete language from subsection (b)(2)(B); to add language requiring a jury commissioner to provide a jury list, to change the word “empaneled” to the word “impaneled”, and to add language pertaining to denial of inspection in subsection (b)(2)(B); to add a new subsection (b)(2)(C) pertaining to providing jury lists to the Health Care Alternative Dispute Resolution

Office; and to add a new subsection (b)(2)(D) pertaining to providing data to the State Board of Elections and State Motor Vehicle Administration; as follows:

Rule 16-1004. ACCESS TO NOTICE, ADMINISTRATIVE, AND BUSINESS LICENSE RECORDS

(a) Notice Records

A custodian may not deny inspection of a notice record that has been recorded and indexed by the clerk.

(b) Administrative and Business License Records

(1) Except as otherwise provided by the Rules in this Chapter, the right to inspect administrative and business license records is governed by Code, State Government Article, §§10-611 through 10-626.

(2) (A) Except as ~~provided by~~ a trial judge orders in connection with a challenge under Code, Courts Article, ~~§8-212 (b) or (c)~~ §§8-408 and 8-409 and as provided in this subsection for jury lists, a custodian shall deny inspection of an administrative record used by the jury commissioner ~~or clerk~~ in connection with the jury selection process. ~~Except as otherwise provided by court order, a custodian may not deny inspection of~~

(B) A jury commissioner shall provide a jury list ~~sent to the court pursuant to Rules~~ as required under Rule 2-512 or 4-312 ~~after the~~. After a jury has been ~~empaneled~~ impaneled and sworn, a custodian shall deny inspection of the jury list and may disclose only the names of the sworn jurors. If the trial judge orders otherwise, a custodian may not disclose the names.

(C) A jury commissioner may provide jury lists to the Health Care Alternative Dispute Resolution Office as required by that Office in carrying out its duties, subject to that Office's adoption of regulations to

> ensure against improper dissemination of juror data.
>
> (D) At intervals to which a jury commissioner agrees, the jury commissioner shall provide the State Board of Elections and State Motor Vehicle Administration with data about prospective, qualified, or sworn jurors needed to correct erroneous or obsolete information, such as that related to a death or change of address, subject to the Board's and Administration's adoption of regulation to ensure against improper dissemination of juror data.
>
> . . .

Rule 16-1004 was accompanied by the following Reporter's Note.

> Subsection (b)(2) is revised to allow use of jury lists as required for trial or, as allowed under Code, Courts Article, §3-2A-03, for arbitration proceedings but to allow dissemination of only the names of sworn jurors to the general public and then (per former Code, Courts Article, §8-212 (c)(1)), if not disallowed by the trial judge. Subsection (b)(2) also is revised to allow dissemination of juror data to the State Board of Elections (per former Code, Courts Article, §8-212 (c)(2)) and, for similar administrative purposes, to the State Motor Vehicle Administration.
>
> Also in subsection (b)(2), the former reference to a "clerk" is deleted to reflect that a clerk is acting as a jury commissioner, when so designated.

Judge Sweeney explained that new language has been added to subsection (b)(2) pertaining to the jury commissioner providing a jury list before the jury has been impaneled, and the custodian denying inspection of the list after the jury has been impaneled.

The Vice Chair said that Mr. Lieberman, Counsel to The Washington Post was present to speak about the Rule. Mr. Lieberman told the Committee that the public access to jury information should be keyed to the access in Rules 2-512 and 4-312. He suggested that Rule 16-1004 go back to the Subcommittee for further modification. He pointed out that an unintended consequence of restricting the dissemination of jury lists is the impact on academics and researchers who study jury verdicts.

The Vice Chair questioned as to whether subsection (b)(2) is constitutional. Mr. Lieberman responded that there is a constitutional right to know the names of sworn jurors, but he was not certain about a right to other information about jurors. Judge Sweeney commented that this issue now is pending in the Pennsylvania Supreme Court in *Pennsylvania v. Long*, 871 A.2d 1262 (Pa. Super. March 31, 2005), *cert. granted in part*, 884 A.2d 248, 249 (Pa. September 21, 2005). Mr. Brault remarked that the names of jurors in Maryland come from the list of the Motor Vehicle Administration (MVA). Anyone could go to the MVA to get an address. Ms. Veronis said that an individual license-holder can block the dissemination of his or her personal information. Mr. Lieberman expressed the press's perspective that providing the names of jurors would be sufficient. A suggestion to cure the problem of restricting the dissemination of information too greatly would be to change the word "may" the first time that it appears in subsection (b)(2)(B) to the word "shall," so that the

beginning language of that provision would be: "... a custodian shall deny inspection of the jury list and shall disclose only the names of the sworn jurors." The intent of this provision is that one is entitled to this information unless a judge has sealed it. Stating this as mandatory makes it clear to the custodians that the information has to be released. The prior law provided that after the master jury wheel was emptied, the names of the jurors were made public. The names, age, education, and specific occupation of the jurors were available unless in the interest of justice it was determined that they should not be released. Now there is no provision for public access to those administrative records. The view of The Washington Post is that this information should be accessible to the public to promote justice and confidence in the judicial system. Mr. Lieberman suggested that the Rule should be changed to be more in the spirit of the former provisions. It is inappropriate for juror information to be completely inaccessible to the public.

Mr. Brault inquired as to whether information about jurors would be available to the public from the U.S. Census. He said that when people research genealogy, they often get information, such as a person's address and marital status, from the U.S. Census. The Vice Chair expressed the view that disclosure of anything other than a juror's name should be prohibited. Professor McLain noted that federal practice is more restrictive. A lawyer cannot speak to the jurors after a trial without the permission of the judge. Mr. Brault said that this is a local

rule. Professor McLain asked Mr. Lieberman about access to the federal jury lists. Mr. Lieberman answered that there are different local rules pertaining to this. He had not litigated the constitutionality of access to the list. There is a presumptive right of access, and an overbroad restriction could be challenged. Professor McLain inquired as to the right of access to the federal jury list in Maryland federal courts, and Mr. Lieberman replied that he was not sure, although in the District of Columbia, the jurors' names and identification numbers are accessible.

The Vice Chair said that Rule 16-1004 would be remanded to the Subcommittee to work on the issues presented today.

Judge Sweeney presented Rule 3.5, Impartiality and Decorum of the Tribunal, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX: THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT

ADVOCATE

AMEND Appendix: the Maryland Lawyers' Rules of Professional Conduct, Rule 3.5 to delete language from subsection (a)(1), to add the words "qualified" and "sworn" to modify the word "juror" in subsection (a)(1), to delete language from subsection (a)(2), to delete language from subsection (a)(5), to add the word "jury" to modify the word "member" and to change the word "juror" to the words "jury member" in subsection (a)(5), and to add the words "qualified" and "sworn" to modify the word "juror" in subsection (a)(6) and section (b), as follows:

Rule 3.5. IMPARTIALITY AND DECORUM OF THE TRIBUNAL

(a) A lawyer shall not:

(1) seek to influence a judge, prospective, qualified, or sworn juror, ~~prospective juror,~~ or other official by means prohibited by law;

(2) before the trial of a case with which the lawyer is connected, communicate outside the course of official proceedings with anyone known to the lawyer to be on the list ~~from which the jurors will be selected~~ for ~~the~~ trial of the case;

(3) during the trial of a case with which the lawyer is connected, communicate outside the course of official proceedings with any member of the jury;

(4) during the trial of a case with which the lawyer is not connected, communicate outside the course of official proceedings with any member of the jury about the case;

(5) after discharge of a jury from further consideration of a case with which the lawyer is connected, ask questions of or make comments to a jury member ~~of that jury~~ that are calculated to harass or embarrass the ~~juror~~ jury member or to influence the ~~juror's~~ jury member's actions in future jury service;

(6) conduct a vexatious or harassing investigation of any prospective, qualified, or sworn juror ~~or prospective juror~~;

(7) communicate ex parte about an adversary proceeding with the judge or other official before whom the proceeding is pending, except as permitted by law;

(8) discuss with a judge potential employment of the judge if the lawyer or a firm with which the lawyer is associated has a matter that is pending before the judge; or

(9) engage in conduct intended to disrupt a tribunal.

(b) A lawyer who has knowledge of any violation of section (a) of this Rule, any improper conduct by a prospective, qualified, or sworn juror ~~or prospective juror,~~ or any improper conduct by another towards a ~~juror or prospective~~ prospective, qualified, or sworn juror, shall report it promptly to the court or other appropriate authority.

COMMENT

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in Rule 16-813, Maryland Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[3] With regard to the prohibition in subsection (a)(2) of this Rule against communications with anyone on "the jury list ~~from which the jurors will be selected~~," see Md. Rules 2-512 (c) and 4-312 (c).

Model Rules Comparison.-- Rule 3.5 retains the former Maryland Rule text and comments, except that paragraph (a)(8) is new and the reference in Comment [1] is to the Code of Judicial Conduct. Changes in ABA Model Rule

3.5 were not adopted.

Rule 3.5 was accompanied by the following Reporter's Note.

> In subsections (a)(1) and (6) and (b), references to "prospective, qualified, or sworn juror" is substituted for the former references to "juror, prospective juror", to conform to the terminology in Code, Courts Article, Title 8.
>
> In subsection (a)(2) and the Comment, references to the "jury list" are substituted for the former references to the "list from which the jurors will be selected", for brevity and consistency with Rules 2-512 and 4-312.
>
> In subsection (a)(5), reference to a "jury member" are substituted for the former references to a "member of that jury", "juror", and "juror's", for consistency.

Judge Sweeney explained that the Rule contains conforming changes to the legislation. Subsection (a)(5) contains some restrictions on a lawyer's conversations with jurors after a case has been decided. Judge Sweeney said that he encourages jurors to talk to lawyers. This helps lawyers to understand how the jurors perceive them. Often the jurors are very critical of the lawyers.

Master Mahasa noted that in the last sentence of Comment 2 which reads: "An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics," the words "no less effectively" might be better stated as "more effectively." The Vice Chair said that the Style

Subcommittee would look at this.

Ms. Potter pointed out that subsection (a)(2) seems to be missing a word. Judge Norton responded that the word “jury” should be placed before the word “list.” By consensus, the Committee approved the Rule as amended.

Judge Sweeney presented Maryland Code of Conduct for Court Interpreters, Canon 3, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX: MARYLAND CODE OF CONDUCT FOR

COURT INTERPRETERS

AMEND Appendix: Maryland Code of Conduct for Court Interpreters, Canon 3 to add the words “prospective, qualified, or sworn” to modify the word “jurors” to the Commentary, as follows:

MARYLAND CODE OF CONDUCT FOR COURT INTERPRETERS

. . .

Canon 3

Impartiality and Avoidance of Conflict of Interest

Interpreters shall be impartial and unbiased and shall refrain from conduct that may give an appearance of bias. Interpreters shall disclose any real or perceived conflict of interest.

Commentary

The interpreter serves as an officer of the court, and the interpreter's duty in a

> court proceeding is to serve the court and the public to which the court is a servant. This is true regardless of whether the interpreter is retained publicly at government expense or privately at the expense of one of the parties.
>
> Interpreters should avoid any conduct or behavior that presents the appearance of favoritism toward any of the parties. Interpreters should maintain professional relationships with the participants and should not take an active part in any of the proceedings.
>
> During the course of the proceedings, interpreters should not converse with parties, witnesses, prospective, qualified, or sworn jurors, attorneys, or law enforcement officers or with friends or relatives of any party, except in the discharge of official functions. It is especially important that interpreters who are familiar with courtroom personnel refrain from casual and personal conversations that may convey an appearance of a special relationship with or partiality to any of the court participants.
>
> . . .

Maryland Code of Conduct for Court Interpreters, Canon 3 was accompanied by the following Reporter's Note.

> In the Comment, the words "prospective, qualified, and sworn" are added to modify "jurors", to emphasize that all three categories of jurors are covered by the statement.

Judge Sweeney explained that the changes to the Code conform it to the legislation. By consensus, the Committee approved the amendments to the Code as presented.

The Vice Chair stated that Rules 2-512, 4-312, and 16-1004

would go back to the appropriate Subcommittee. She thanked the consultants for their assistance.

Agenda Item 2. Consideration of proposed Rules changes recommended by the Discovery Subcommittee and certain proposed amendments to Rule 2-510 recommended by the Trial Subcommittee; Amendments to: Rule 2-402 (Scope of Discovery), Rule 2-421 (Interrogatories to Parties), Rule 2-422 (Discovery of Documents, Electronically Stored Information, and Property), Rule 2-424 (Admission of Facts and Genuineness of Documents), Rule 2-433 (Sanctions), Rule 2-504 (Scheduling Order), Rule 2-504.1 (Scheduling Conference), Rule 2-510 (Subpoenas); Proposed New Rule 5-502 (Attorney-Client Privilege and Work Product: Limitations on Waiver); and Amendments to: Appendix: Form Interrogatories, Form 3 (General Interrogatories)

The Vice Chair told the Committee that the Discovery Subcommittee had worked very hard on the issue of changing the rules to address issues pertaining to electronically stored information ("ESI"). They had the assistance of some excellent consultants.

Mr. Klein, Chair of the Discovery Subcommittee, explained that most documents now are in digital form, in word processor documents, databases, spread sheets, e-mails, and voicemail. The documents are stored in such items as personal computers, blackberries, cell phones, PDA's, fax machines, digital cameras, and voicemail systems.

The existing Rules of Procedure do not adequately address the differences between traditional paper documents and digital documents. They differ in terms of sheer volume, the number of locations in which they are stored, and in terms of data

volatility. It is more economical to store documents electronically, rather than in paper form. Increasingly large amounts of information can be stored in increasingly compact and cheaper storage media. Floppy discs (1.44 megabytes), which hold about 720 typed pages are fast becoming an extinct storage medium. A compact disc (650 megabytes) holds about 325,000 pages. A two-gigabyte (2,000 megabytes) "thumbdrive" holds about one million pages. Large corporate computer network backup systems are measured in terabytes (one million megabytes). One terrabyte holds 500 million pages. An average employee receives 25 e-mails each day. A business with 100 employees could receive as much as 625,000 e-mails each year. E-mail generally tends to be stored in a unorganized fashion, and often in multiple places, such as office PC's, network servers, backup archives, home computers, laptops, PDA's, etc. Digital documents also are volatile, such that the mere act of opening a document can alter or damage it. Computers recycle and reuse storage space. Every document in electronic form can look like an "original."

Digital documents also can differ in kind from conventional paper documents. Digital transactions often do not generate a paper analog. For example, an e-ticket in an airline database generates no physical ticket. Unlike conventional documents, electronic documents typically contain non-traditional types of data. For example, "metadata," which is data about data, often is associated with electronic documents. By examining the metadata embedded in electronic files, one may be able to

determine such things as who created the document, when it was created, any changes made to the document, when they were made and by whom. By examining computer "system data," one can determine when a user logged-in to the system, any websites visited, passwords used, and the documents they accessed, printed or faxed from the system. If paper documents are shredded, the data they contain effectively is destroyed. However, the data contained in documents "deleted" from a computer often still exists on the system storage media and is capable of being restored and retrieved. This can create a temptation to engage in broader discovery than is possible with conventional documents.

Mr. Klein said that one of the excellent consultants to the Subcommittee was the Honorable Paul W. Grimm, Magistrate Judge of the United States District Court for the District of Maryland. Judge Grimm wrote the opinion in *Hopson v. the Mayor and City Council of Baltimore*, 232 F.R.D. 228 (2005), a very informative decision concerning ESI. In *Hopson*, Judge Grimm cited examples of the high costs, even before privilege review, that can be incurred when attempting to restore and retrieve documents stored on computer backup tapes. In one case a defendant averred that the pre-privilege review cost of restoring and producing e-mail that had been requested by plaintiffs in a civil case would be $395,944 for a limited sampling of eight backup tapes, and $9,750,000 to restore and produce information from all 200 of the

backup tapes that the defendant had been asked to review. The high costs of ESI production often includes the costs of experts retained by both the requesting and producing parties. In *Hopson*, Judge Grimm cited annual revenue figures and projections concerning the costs of retaining such data consultants. These costs grew from $40 million in 1999 to $430 million in 2003. Such costs were projected to be $1.9 billion in 2006, and $2.865 billion in 2007.

Mr. Klein continued that the Rules of Procedure must be changed to accommodate ESI. He thanked the Subcommittee for its hard work, and he acknowledged the help of the excellent consultants, including Judge Grimm; the Honorable Steven I. Platt of the Circuit Court for Prince George's County and Don Rea, Esq. of McGuire Woods, both from the Business and Technology Track Committee of the circuit courts; Heather Rich, Esq. of Reed Smith representing Lawyers for Civil Justice; and Laura Ellsworth, Esq. of Jones Day on behalf of the Product Liability Advisory Council. Ms. Ellsworth also serves as co-managing editor of <u>The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production</u>, a book produced by both sides of the bar, academics, government officials, information technology consultants, and judges. On December 1, 2006, the revised federal rules on ESI will go into effect, based on this work. Mr. Klein thanked the staff of the Rules Committee, Sandra Haines, Sherie Libber, and Cathy Cox for their

assistance. He also thanked Mr. Karceski, Chair of the Criminal Subcommittee; Mr. Michael, Chair of the Evidence Subcommittee; Judge Dryden, Chair of the District Court Subcommittee, and Mr. Brault, liaison with the Uniform State Laws Committee on ESI, for their help.

Mr. Klein explained that the Federal Rules Committee studied ESI for many years and then promulgated rules. The Discovery Subcommittee looked at the federal rules as a starting point when considering changes to the Maryland Rules. The general philosophy of the Subcommittee was to attempt to harmonize the Maryland and federal approach to ESI, which would be helpful to lawyers. The commentary is intended to remain with the Rules, similar to the commentary that goes with the Maryland Code of Judicial Conduct. The commentary is derived from the federal rules commentary and The Sedona Principles. The Vice Chair asked if the intention is that the Committee adopt the commentary as well as the Rules, and Mr. Klein replied in the affirmative. He explained that the comparison chart included in the meeting materials compares the new federal rules located on the left with the proposed changes to the Maryland Rules on the right. Master Mahasa inquired as to whether approval of the federal rules is effected by an act of Congress. Mr. Klein answered that after the federal rules are promulgated by the Supreme Court, if Congress does not intervene, they become law automatically. Judge Matricciani remarked that the Business and Technology judges adopted guidelines regarding ESI, and the committee was

chaired by Donald Rea, Esq., who was also a consultant to the Discovery Subcommittee. The practical aspects of the guidelines provide for the court to address ESI early in litigation in the scheduling order.

Mr. Klein said that the commentary will amplify on the blackletter of the Rules, explain technical concepts and provide examples. The Vice Chair acknowledged that the commentary would be helpful, but she cautioned that generally, the Committee adopts short Committee notes. The Maryland Lawyers' Rules of Professional Conduct have a commentary attached to them, but they have a long history that needs explanation. The Vice Chair added that she was not sure yet if she and the other members of the Style Subcommittee agree with the concept of having a commentary that accompanies the proposed Rules pertaining to ESI.

Mr. Klein presented Rule 2-402, Scope of Discovery, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE--CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-402 to delete language from and add language referring to "electronically stored information" to section (a); to change the tagline of section (b) and to delete language from and add language to section (b); to add a new subsection (b)(1) pertaining to discovery of inaccessible electronically stored information; to add a tagline to and reletter subsection (b)(2); to change the section references, delete language from, and add language referring to

"electronically stored information" to section (d); to add a new section (e) pertaining to claims of privilege or protection of trial-preparation materials; to change the subsection reference within subsection (g)(1)(B); to change the subsection reference within subsection (g)(3); to add a Comment to the Rule; and to reletter the Rule; as follows:

Rule 2-402. SCOPE OF DISCOVERY

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(a) Generally

A party may obtain discovery regarding any matter, not privileged, including the existence, description, nature, custody, condition, and location of any documents, electronically stored information, ~~or other~~ and tangible things and the identity and location of persons having knowledge of any discoverable matter, if the matter sought is relevant to the subject matter involved in the action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. It is not ground for objection that the information sought is already known to or otherwise obtainable by the party seeking discovery or that the information will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. An interrogatory or deposition question otherwise proper is not objectionable merely because the response involves an opinion or contention that relates to fact or the application of law to fact.

(b) ~~Alterations~~ Limitations and Modifications

In a particular case, the court, on motion or on its own initiative and after consultation with the parties, by order may

limit or ~~alter the limits in~~ modify these rules on the length and number of depositions, the number of interrogatories, the number of requests for production of documents, and the number of requests for admissions.

(1) Information Not Reasonably Accessible

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost, provided that the party who declines to provide discovery states the reasons the party contends that production of the identified source would cause undue burden or cost. On a motion to compel discovery or for a protective order, the party from whom discovery is sought shall show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court nonetheless may order discovery and may specify conditions for discovery, including cost allocation.

Committee note: A responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the limitations set out in subsection (b)(2) of this Rule that apply to all discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

(2) Other Limitations

The court shall limit the frequency or extent of use of the discovery methods otherwise permitted under these rules if it determines that ~~(1)~~ (A) the discovery sought is unreasonably cumulative or duplicative or

is obtainable from some other source that is more convenient, less burdensome, or less expensive; ~~(2)~~ (B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or ~~(3)~~ (C) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the complexity of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

(c) Insurance Agreement

A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business might be liable to satisfy part or all of a judgment that might be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this section, an application for insurance shall not be treated as part of an insurance agreement.

(d) Trial Preparation - Materials

Subject to the provisions of sections ~~(e) and (f)~~ (f) and (g) of this Rule, a party may obtain discovery of documents, electronically stored information, ~~or other~~ and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the materials are discoverable under section (a) of this Rule and that the party seeking discovery has substantial need for the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of these materials when the required showing has been made, the court shall protect against disclosure of the

mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

(e) Trial Preparation – Claims of Privilege or Protection of Trial-Preparation Materials

(1) Information Withheld

When a party withholds information otherwise discoverable under section (a) of this Rule by claiming that it is privileged or subject to protection as trial-preparation material, the party shall make the claim expressly and shall describe the nature of the documents, electronically stored information, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(2) Information Produced

If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, then the party making the claim shall notify any party that received the information of the claim and the basis for it within a reasonable time. After being notified, a party shall promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. If a receiving party wishes to determine the validity of a claim of privilege, it shall promptly file a motion under seal requesting that the court determine the validity of the claim. If a receiving party disclosed the information before being notified, it shall take reasonable steps to retrieve it. The producing party shall preserve the information until the claim is resolved.

~~(e)~~ (f) Trial Preparation - Party's or Witness' Own Statement

A party may obtain a statement

concerning the action or its subject matter previously made by that party without the showing required under section (d) of this Rule. A person who is not a party may obtain, or may authorize in writing a party to obtain, a statement concerning the action or its subject matter previously made by that person without the showing required under section (d) of this Rule. For purposes of this section, a statement previously made is (1) a written statement signed or otherwise adopted or approved by the person making it, or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, that is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

~~(f)~~ (g) Trial Preparation - Experts

(1) Expected to be Called at Trial

(A) Generally

A party by interrogatories may require any other party to identify each person, other than a party, whom the other party expects to call as an expert witness at trial; to state the subject matter on which the expert is expected to testify; to state the substance of the findings and the opinions to which the expert is expected to testify and a summary of the grounds for each opinion; and to produce any written report made by the expert concerning those findings and opinions. A party also may take the deposition of the expert.

Committee note: This subsection requires a party to disclose the name and address of any witness who may give an expert opinion at trial, whether or not that person was retained in anticipation of litigation or for trial. Cf. *Dorsey v. Nold*, 362 Md. 241 (2001). See Rule 104.10 of the Rules of the U.S. District Court for the District of Maryland. The subsection does not require, however, that a party name himself or herself as an expert. See *Turgut v. Levin*, 79 Md.

App. 279 (1989).

(B) Additional Disclosure with Respect to Experts Retained in Anticipation of Litigation or for Trial

In addition to the discovery permitted under subsection ~~(f)(1)(A)~~ (g)(1)(A) of this Rule, a party by interrogatories may require the other party to summarize the qualifications of a person expected to be called as an expert witness at trial and whose findings and opinions were acquired or obtained in anticipation of litigation or for trial, to produce any available list of publications written by that expert, and to state the terms of the expert's compensation.

(2) Not Expected to be Called at Trial

When an expert has been retained by a party in anticipation of litigation or preparation for trial but is not expected to be called as a witness at trial, discovery of the identity, findings, and opinions of the expert may be obtained only if a showing of the kind required by section (d) of this Rule is made.

(3) Fees and Expenses of Deposition

Unless the court orders otherwise on the ground of manifest injustice, the party seeking discovery: (A) shall pay each expert a reasonable fee, at a rate not exceeding the rate charged by the expert for time spent preparing for a deposition, for the time spent in attending a deposition and for the time and expenses reasonably incurred in travel to and from the deposition; and (B) when obtaining discovery under subsection ~~(f)(2)~~ (g)(2) of this Rule, shall pay each expert a reasonable fee for preparing for the deposition.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 400 c and the 1980 version of Fed. R. Civ. P. 33 (b).
Section (b) is new and is derived from the

2000 version of Fed. R. Civ. P. 26 (b) (2), except that subsection (b)(1) is derived from the 2006 Fed. R. Civ. P. 26 (b)(2)(B).

Section (c) is new and is derived from the 1980 version of Fed. R. Civ. P. 26 (b) (2).

Section (d) is derived from former Rule 400 d.

Section (e) is derived from the 2006 version of Fed. R. Civ. P. 26 (b)(5).

Section ~~(e)~~ (f) is derived from former Rule 400 e.

Section ~~(f)~~ (g)

Subsection ~~(f)(1)~~ (g)(1) is derived in part from the 1980 version of Fed. R. Civ. P. 26 (b)(4) and former Rule 400 f and is in part new.

Subsection ~~(f)(2)~~ (g)(2) is derived from the 1980 version of Fed. R. Civ. P. 26 (b)(4) and former Rule U12 b.

Subsection ~~(f)(3)~~ (g)(3) is derived in part from the 1980 version of Fed. R. Civ. P. 26 (b)(4) and is in part new.

COMMENT

Several of the Rules of Procedure for Maryland are proposed for amendment to conform to changes in the federal rules pertaining to e-discovery. This Commentary borrows heavily from the federal commentary. For the sake of brevity, not all of the federal commentary has been included; however, any omission is not necessarily a rejection of the federal principles.

Section (a) of Rule 2-402 is amended to parallel Rule 2-422 (a) by recognizing that the scope of discovery encompasses electronically stored information as well as documents and other tangible things relevant to the subject matter involved in the action. The term "electronically stored information" has the same broad meaning in Rule 2-402 as in Rule 2-422, encompassing, without exception, whatever is stored electronically.

The amendment to subsection (b)(1) is designed to address issues raised by difficulties in locating, retrieving, and

providing discovery of some electronically stored information. There are many types of technological features that may affect the burdens and costs of accessing electronically stored information. Some systems retain information on sources that are accessible only by incurring substantial burdens or costs. The modified language is added to regulate discovery from these sources. If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the issue may be raised by a motion to compel discovery or a motion for a protective order. If the parties cannot resolve the issue ahead of time, and the court must decide, the responding party shall show that the identified sources of information are not reasonably accessible because of undue burden or cost. The requesting party has the burden of showing that its need for the discovery outweighs the burden and cost of locating, retrieving, and producing the information.

Ordinarily, the reasonable costs of retrieving and reviewing electronically stored information should be borne by the responding party, unless the information sought is not reasonably available to the responding party in the ordinary course of business. For example, restoring deleted data, disaster recovery tapes, residual data, or legacy systems may involve extraordinary effort or resources to restore data to an accessible format. Rule 2-402 (b)(1) empowers the court to shift costs where the demand is unduly burdensome because of the nature of the effort involved to comply. If a court requires retrieval of information that is not reasonably available, it should also adjudicate the need for cost-shifting. However, shifting the costs of efforts to preserve or produce electronically stored information should not be used as an alternative to sustaining a responding party's objection to undertaking such efforts in the first place. Instead such efforts should be required only where the requesting party demonstrates substantial need or justification. *See, The Sedona Conference,*

The Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic Document Production, 2005, Principle 13, and related Comment.

Factors to be considered by the court in deciding whether to shift costs to the requesting party especially where data is inaccessible, include: the extent to which the request is specifically tailored to discover relevant information; the availability of the information from other sources; the total cost of production, compared to the amount in controversy and compared to the resources available to each party; the relative ability of each party to control costs and its incentive to do so; the importance of the issues at stake in the litigation; and the relative benefits to the parties of obtaining the information. Id., Comment 13 a. See also, *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 322 (S.D.N.Y. 2003).

The limitations of Rule 2-402 (b)(2) continue to apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case.

Rule 2-402 (e) adopts almost verbatim the procedure established in Fed. R. Civ. P. 26 (b)(5) to allow the responding party to assert a claim of privilege or work-product protection after production. It is a procedural device for addressing the increasingly costly and time-consuming efforts to reduce the number of inevitable mistakes because of the amount and nature of electronically stored information available in the present age. The initial draft of the federal rule provided for raising a claim of privilege or work product within a "reasonable time." Although the final draft

of the federal rule eliminated this language, the Discovery Subcommittee proposes to include it in Rule 2-402 (e) in order to conform to the language of *Elkton Care Center Associates v. Quality Care Management, Inc.*, 145 Md. App. 532 (2002). Preservation and waiver of privilege and work product protection are matters of substantive, not procedural law.

The volume of electronically stored information may make privilege determinations more difficult, and review of the information more expensive and time-consuming. Aspects of electronically stored information pose particular difficulties for privilege review, such as information describing the history, tracking, or management of an electronic file, which is not usually apparent to the reader viewing a hard copy or screen image. Parties may agree to certain protocols to minimize the risk of waiver, such as agreeing that the responding party will provide certain requested materials for initial examination without waiving any privilege or protection, known as a "quick peek." The requesting party then designates the documents it wishes to have actually produced. Voluntary arrangements, such as "clawback agreements," that production without intent to waive privilege or protection should not be a waiver as long as the responding party identifies the documents mistakenly produced and that the documents should be retained under those circumstances may be appropriate depending on the nature of the case. See also, The Sedona Conference, *The Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic Document Production*, 2005, Comment 10.d.

Mr. Klein explained that ESI has been added to the litany of documents and tangible things of which a party may obtain discovery in section (a). The word "other" has been deleted, because ESI is not a tangible thing. This is similar to the federal rules, and it appears in several places in the Rules.

New subsection (b)(1) is taken directly from the federal rules. It provides that if a party who requested discovery of ESI and was refused disagrees with the reasoning offered by the refusing party and moves to compel discovery, the burden is on the party from whom discovery is sought to convince the court that the information is not reasonably accessible because of undue burden or cost.

The Vice Chair commented that the last sentence of subsection (b)(1) does not include a threshold for the court to decide the matter. Mr. Klein noted that the federal language provides for a showing of good cause, and the commentary to the federal rules provides a standard of "substantial need or justification." He said that he had discussed this with the Vice Chair. The Vice Chair pointed out that in the 4th paragraph of the commentary, one of the comments that is attributed to The Sedona Principles refers to the requesting party demonstrating substantial need or justification. Mr. Klein proposed amending the last sentence of subsection (b)(1) to read: "If that showing is made, the court nonetheless may order discovery and may specify conditions for discovery, if the requesting party can show substantial need or justification...". He noted that costs could be split between the parties, but the court could shift the costs to one party. The Vice Chair suggested that in place of the language "including cost allocation," the following language should be substituted: "including assessment of costs." Judge Matricciani remarked that first the party from whom discovery is

sought must show that the requested material is not reasonably accessible and producing it would cause an undue burden. Mr. Klein added that the burden then shifts to the requesting party to make a showing of substantial need or justification. Mr. Sykes commented that the mere fact that there is a substantial need for the material is not enough; the party must show that the need outweighs the undue expense. Some balancing language is needed.

Mr. Klein pointed out that the corresponding federal rule, Fed. R. Civ. P. 26 (b)(2)(B) states that the requesting party must show good cause. Subsection (b)(2) of Rule 2-402 provides some factors to consider, including the complexity of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. Subsection (b)(1) could provide that the requesting party must show substantial need or justification, considering the limitations of subsection (b)(2)~~(B)~~. Mr. Kratovil remarked that the party who requested the discovery material should pay for it. Mr. Klein responded that one factor for the court to consider is whether the cost of providing the discovery material would close down the business of the party from whom discovery is sought.

Ms. Potter told the Committee that at the Subcommittee meeting, she had expressed the view that the language providing for a motion to compel in subsection (b)(1) is not placed in the correct rule. It should go into Rule 2-432, Motions upon Failure

to Provide Discovery. However, the Subcommittee disagreed with this suggestion. Mr. Klein said that a cross reference to Rule 2-432 could be added at the end of subsection (b)(1). Mr. Johnson suggested that the Rules should be drafted so they are easy for practitioners to understand. It would be better to leave the reference to the "motion to compel" in Rule 2-402, so lawyers do not have to turn to another Rule to complete the procedures. The Vice Chair remarked that this is a style issue. Ms. Potter observed that adding a separate section of the Rules pertaining to ESI would make the Rules more user-friendly.

Mr. Klein suggested that the last sentence of subsection (b)(1) should read as follows: "If that showing is made, the court nonetheless may order discovery and may specify conditions for discovery, including assessment of costs, provided that the requesting party demonstrates substantial need or justification for the information, considering the limitations of Rule 2-402 (b)(2)." Mr. Brault suggested that the ending language be "considering the limitations of Rule 2-402 (b)(2) of this Rule." By consensus, the Committee agreed to those changes.

Mr. Klein said that he had spoken with the Vice Chair about the Committee note following subsection (b)(1). The Vice Chair commented that the contents of the note, while helpful, do not belong in a note. The first sentence could be placed in the Rule, and the rest of the note is not necessary. Ms. Ogletree expressed the opinion that the second sentence is helpful. The Vice Chair remarked that required procedures should not be placed

in a Committee note. Judge Matricciani noted that discovery of ESI is not ordinary discovery, and he expressed the view that the note should not be deleted. The Vice Chair pointed out that Rule 2-422, Discovery of Documents and Property, provides in section (c) that if the request for documents is refused, the reasons for refusal shall be stated. Similar language may need to be more expressly stated in Rule 2-402. Judge Matricciani observed that the contents of the Committee note are helpful to the court for a balancing analysis. Mr. Klein stated that the note is needed. Mr. Sykes suggested that the language in the note referring to the nature of the showing should be put into the body of the Rule. The Vice Chair suggested that the Subcommittee should look at the first sentence to see where it could be placed in the Rule and the second and third sentences to consider if they should be placed in the Rule or deleted.

Mr. Klein said that section (d) has ESI added to list of documents and tangible things. Section (e) is new and pertains to privilege and waiver of privilege. The costs for practitioners to review massive amounts of data are staggering. The chances that a practitioner could make a mistake and provide privileged information are likely. The concepts of "quick peek" and "clawback agreements" come into play. A "quick peek" involves an agreement that the responding party will provide certain requested materials for initial examination without waiving any privilege or protection. The requesting party then designates the materials it wishes to have actually produced. A

"clawback agreement" is an agreement that (1) production without intent to waive privilege or protection is not a waiver as long as the responding party identifies the documents mistakenly produced and (2) the mistakenly produced documents will be returned under those circumstances.

Mr. Klein noted that the federal and Maryland Rules deal with privilege to avoid the lurking possibility of malpractice. There are two contexts. One is that information is withheld on the grounds of privilege; the other is that information is produced, and then there is a post-production assertion of privilege. The language of section (e) is derived directly from Fed. R. Civ. P. 26 (b)(5).

Professor McLain inquired as to whether section (e) covers trade secrets. Mr. Klein replied that it does not cover trade secrets, but he would not disagree with a modification of the Rule to cover them. Professor McLain explained that the law requires that trade secrets be kept secret. Mr. Brault asked what the most common claim under section (e) is. Mr. Klein responded that it is attorney-client privilege. The Vice Chair commented that the federal rules do not address trade secrets. Judge Spellbring pointed out that the commentary after Rule 2-422 states that a Rule 2-422 inspection presents possible concerns such as invading trade secrets. The Vice Chair noted that Rule 2-402 (a) provides that one must produce whatever is not privileged. Section (e) provides that discovery material may be withheld on the grounds of privilege. Are trade secrets

privileged? Professor McLain responded that they are not privileged.

Mr. Maloney expressed the view that the language of the Rule is appropriate. Mr. Michael remarked that if the Rule extends to trade secrets, it could then be considered to apply to personnel evaluations, and the list could lengthen even further. Traditional applications of the Rule are to work product and attorney-client privilege, which are appropriate. Adding in even one more topic opens the door to a potentially long list of other subjects.

The Vice Chair inquired as to what happens if information obtained by a "quick peek" or a "clawback" agreement includes information not otherwise discoverable. Mr. Maloney said that typically, a confidentiality agreement does not include trade secrets. Only privileged information and work product are protected. Mr. Klein commented that the producing party who receives the request for discovery agrees to give access to information without a review for what may be privileged. The requesting party discovers the privileged material but disregards it, saving the producing party from spending years looking through the material to redact privileged information before any material is provided, so there is a *quid pro quo*.

Judge Matricciani remarked that the scope of privilege should be attorney-client and work product. The Vice Chair suggested that the Maryland Rules conform to federal practice.

Professor McLain noted that a confidentiality agreement between the parties does not necessarily protect the information. *Hopson* expressed the concern that while an agreement to keep information private is enforceable as between the parties, if a third party has access to it, it will no longer be confidential.

Mr. Brault inquired as to when the federal rules will go into effect. Mr. Klein answered that except for Fed. R. Evid. 502, the federal rules go into effect on December 1, 2006.

Mr. Klein drew the Committee's attention to the comment at the end of Rule 2-402. The Vice Chair questioned including comments in the Rules relating to only one concept, ESI. Mr. Klein responded that he feels strongly that the comments are needed, even if it is unusual to have them. Mr. Sykes suggested that the comments could be placed in the introduction to the report to the Court of Appeals. This would be part of the report and would be a help to the practitioner. The Vice Chair expressed her agreement with this suggestion. She proposed that the comments be shortened. Whatever is necessary in the current comments can be placed in a Committee note within the Rules. One example would be the factors that are to be considered by the court in deciding whether to shift costs to the requesting party. These are located in the 5th paragraph of the commentary to Rule 2-402. Mr. Klein pointed out that the definitions of "quick peek" and "clawback agreements" in the 8th paragraph of the commentary should be included somewhere in the Rules, because

otherwise no one will understand what they are.

Mr. Brault suggested that the comments could be included for a year or two as an appendix. Mr. Maloney recommended that the comments be on a website referred to in the Rules. Mr. Michael observed that the Discovery Guidelines were not adopted by the Court of Appeals but were published. The Vice Chair noted that the comments are more explanatory and provide background for the changes to the Rules. She said that she was satisfied with the idea of eliminating some of the comments, moving some into Committee notes, and including some in the report to the Court of Appeals. Mr. Klein agreed to do this. Therefore, none of the comments would be discussed at today's meeting. Mr. Johnson questioned as to whether the reports to the Court are available with the Rules. The Vice Chair replied negatively. She acknowledged that they are difficult to find. The issue is how to make the comments readily available. Mr. Brault expressed his preference for an appendix and not a website. The Reporter pointed out that the comments will be included on the Rules Committee's portion of the Judiciary's website as part of the minutes of today's meeting. By consensus, the Committee approved Rule 2-402 as amended.

Mr. Klein presented Rule 2-421, Interrogatories to Parties, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

AMEND Rule 2-421 to add language to section (c) referring to "electronically stored information" and to add a Comment to the Rule, as follows:

Rule 2-421. INTERROGATORIES TO PARTIES

. . .

(c) Option to Produce Business Records

When (1) the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of those business records or a compilation, abstract, or summary of them, and (2) the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, and (3) the party upon whom the interrogatory has been served has not already derived or ascertained the information requested, it is a sufficient answer to the interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect the records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

. . .

COMMENT

The amendment to Rule 2-421 clarifies how the option to produce business records to

respond to an interrogatory operates in the information age. The amendment makes clear that the option to produce business records includes electronically stored information.

Mr. Klein noted that language referring to ESI has been added to section (c). The Vice Chair noted that the comment at the end of the Rule is not helpful. Ms. Ogletree remarked that the Subcommittee did not consider which comments should be retained. By consensus, the Committee approved the Rule as presented.

Mr. Klein presented Rule 2-422, Discovery of Documents, Electronically Stored Information, and Property, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-422 to add language to section (a) referring to and defining "electronically stored information," to add a sentence to section (b) pertaining to specifying the forms for producing electronically stored information, to delete language from and add language to section (c) pertaining to refusal of the form for providing electronically stored information and disclosure of the form the responding party intends to use, to add a cross reference after section (c), to add language to section (d) providing a certain exception, to create a new subsection (d)(1) that pertains to electronically stored information and adds a certain exception, to add a new subsection (d)(2) pertaining to the form for producing electronically stored information by the responding party, to add a

new subsection (d)(3) providing that only one form is necessary, and to add a Comment to the Rule, as follows:

Rule 2-422. DISCOVERY OF DOCUMENTS, ELECTRONICALLY STORED INFORMATION, AND PROPERTY

(a) Scope

Any party may serve one or more requests to any other party (1) as to items that are in the possession, custody, or control of the party upon whom the request is served, to produce and permit the party making the request, or someone acting on the party's behalf, to inspect ~~and~~, copy, test, or sample ~~any~~ designated documents or electronically stored information (including but not limited to writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form) or to inspect and copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 2-402 (a); or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection, measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the property, within the scope of Rule 2-402 (a).

(b) Request

A request shall set forth the items to be inspected, either by individual item or by category, and shall describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which

electronically stored information is to be produced.

(c) Response

The party to whom a request is directed shall serve a written response within 30 days after service of the request or within 15 days after the date on which that party's initial pleading or motion is required, whichever is later. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is refused, ~~in which event the reasons for refusal shall be stated~~ including a refusal of the requested form or forms for producing electronically stored information, stating fully the grounds for refusal. If the refusal relates to part of an item or category, the part shall be specified. If objection is made to the requested form or forms for producing electronically stored information, or if no form was specified in the request, the responding party shall state the form or forms it intends to use.

Cross reference: See Rule 2-402 (b)(1) concerning allocation of the costs of discovery and (b)(2) for a list of factors used by the court to determine the reasonableness of discovery requests.

(d) Production

Unless the parties otherwise agree, or the court orders otherwise:

(1) ~~A~~ a party who produces documents or electronically stored information for inspection shall produce ~~them as they are~~ the documents or information as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request, except as provided in subsection (d)(2) of this Rule;

(2) if a request does not specify the form or forms for producing electronically stored information, a responding party shall

produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(3) a party need not produce the same electronically stored information in more than one form.

Source: This Rule is derived from former Rule 419 and the 1980 and 2006 versions of Fed. R. Civ. P. 34.

COMMENT

The amendment to Rule 2-422 (a) adds "electronically stored information" as a category subject to production, in addition to documents and other tangible things. The amendments make clear that parties may request an opportunity to test or sample materials sought under the rule in addition to inspecting and copying them.

Rule 2-422 inspection should be the exception and not the rule for discovery of electronically stored information. Usually, the issues in litigation relate to the informational content of the data held on computer systems, not the actual operations of the systems. Therefore, in most cases, if the producing party provides the informational content of the data, there is no need or justification for direct inspection of the respondent's computer systems. A Rule 2-422 inspection presents possible concerns such as:

(a) invading trade secrets;

(b) revealing other highly confidential information, such as personnel evaluations and payroll information, properly private to individual employees;

(c) encroaching upon confidential attorney-client communications and other confidential material prepared and organized by the party's attorneys;

(d) massively disrupting the ongoing business; and

(e) endangering the stability of operating systems, software applications, and electronic files if certain procedures or software are used inappropriately.

Further, Rule 2-422 inspections of electronic data are likely to be particularly ineffective. *See In re Ford Motor Co.*, 345 F. 3d 1315 (11th Cir. 2003) (vacating order allowing plaintiff direct access to defendant's databases).

To justify the onsite inspection of respondent's computer systems, a party should be required to demonstrate that there is a substantial need to discover information about the computer system and programs used (as opposed to the data stored on that system) and that there is no reasonable alternative to an onsite inspection. Any inspection procedure should be documented in an agreed-upon (and/or court-ordered) protocol and should be narrowly restricted to protect confidential information and system integrity and to avoid giving the discovering party access to data unrelated to the litigation. Further, no inspection should be permitted to proceed until the producing party has had a fair opportunity to review the data subject to inspection. Where the requesting party makes the required showing to justify inspection of the other party's systems, the data subject to inspection should be dealt with in a way to preserve the producing party's rights, for example, through the use of "neutral" court-appointed consultants. See, generally, The Sedona Conference, *The Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic Document Production*, 2005, Comment 6. c.

Section (b) is amended to permit the requesting party to designate the form or forms in which it wants electronically stored information produced. The form of production typically is more important to the exchange

of electronically stored information than of hard-copy materials. Specifying the form should facilitate the orderly, efficient, and cost-effective discovery of electronically stored information. Recognizing that different forms of production may be appropriate for different types of electronically stored information, the Rule provides that the requesting party may ask for different forms of production for different types of electronically stored information. The Rule requires that if the responding party objects to responding or to the form stated by the requesting party, the responding party shall state fully the reasons for refusing to respond to the request. A new cross reference points out that Rule 2-402 (b)(1) concerns allocation of the costs of discovery, and (b)(2) contains a list of factors used by the court in determining the reasonableness of discovery requests. The Rule also requires that if the responding party objects to the form of production, or if no form was specified in the request, the responding party shall state the form or forms it intends to use. Stating the intended form before the production occurs may permit the parties to identify and seek to resolve disputes before the expense and work of the production occurs.

Subsection (d)(1) is amended to require that, just as with paper documents, if electronically stored information is organized for production in a manner different from which it is kept in the ordinary course of business, it must be organized and labeled to correspond with the categories of the request for production.

New subsection (d)(2) is added to provide that if the form of production is not specified by party agreement or court order, the responding party shall produce electronically stored information either in a form or forms that are reasonably usable. Under some circumstances, the responding party may need to provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party to

use the information.

Mr. Klein explained that in addition to changes referring to ESI in section (a), section (b) adds the concept of specifying the form or forms in which electronically stored information is to be produced when the information is requested. There are a variety of ways in which to produce ESI. Judge Matricciani commented that the concept of "metadata" needs to be addressed. This means information about a particular data set which describes how, when, and by whom it was collected, created, accessed, and modified, as well as how it is formatted. Some ESI includes metadata; some, such as a "PDF" file, does not. Section (c) provides for refusing requested forms for producing ESI, by "stating fully the grounds for refusal." This language appears in section (b) of Rule 2-421, but it has never been used in Rule 2-422 up until now. Mr. Brault asked why the word "fully" is necessary. Mr. Klein responded that this language appears in other Rules. Mr. Brault expressed the opinion that the word "fully" adds nothing to the meaning of the sentence. The Vice Chair remarked that the word adds emphasis requiring more explanation. Judge Spellbring suggested that the language could be changed to: "state factually." The Vice Chair suggested that the Discovery Subcommittee look at this language throughout the Rules in Title 2, Chapter 400, Discovery.

Mr. Klein said that the last sentence of section (c) is new. It requires the responding party who objects to the form

requested for producing ESI to state the form it intends to use. In section (d), ESI has been added as an additional concept for production. The ESI is to be produced in a form or forms in which it is ordinarily maintained or that are reasonably usable. Mr. Brault asked whether the language pertaining to the production of ESI is the same as the federal rule. Mr. Klein answered that it is mostly taken from the federal language, but the Subcommittee added the concept of forms that are reasonably usable. By consensus, the Committee approved the Rules as presented.

Mr. Klein presented Rule 2-424, Admission of Facts and Genuineness of Documents, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-424 to add a reference to "electronically stored information" and to add a Comment to the Rule, as follows:

Rule 2-424. ADMISSION OF FACTS AND GENUINENESS OF DOCUMENTS

(a) Request for Admission

A party may serve one or more written requests to any other party for the admission of (1) the genuineness of any relevant documents <u>or electronically stored information</u> described in or exhibited with the request, or (2) the truth of any relevant matters of fact set forth in the request.

> Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Each matter of which an admission is requested shall be separately set forth.
>
> . . .
>
> **COMMENT**
>
> The amendment to Rule 2-424 (a) adds a reference to "electronically stored information" to clarify that parties may request the admission of the genuineness of this type of information as well as relevant documents. Corollary Fed. R. Civ. P. 36 (a) does not expressly address electronically stored information. The Committee believes this to be an inadvertent omission in the federal drafting process.

Mr. Klein told the Committee that although the reference to ESI does not appear in Fed. R. Civ. P. 36 (a), the Subcommittee added it to the comparable Maryland Rule, believing that its omission may have been an oversight in the federal drafting process. Mr. Sykes inquired as to how requests for admission would be served in a multi-party case that involves ESI. Are they served only on the party from whom the discovery is requested or on all parties? Mr. Brault remarked that the same problem arises in Rule 2-422. Are co-parties bound by an admission made by one party or by an agreement as to the form of production of ESI? The Vice Chair pointed out that the second sentence of Rule 2-424 refers to copies of documents, but not to copies of ESI. Mr. Michael questioned as to whether all parties would get a document requested by one party, such as an x-ray on

computer disc. The Vice Chair asked if the computer disc would have been requested by all the parties, and Mr. Michael answered negatively. Mr. Brault said that answers to interrogatories are served on all parties. Production of documents are limited to the requesting party. If a non-requesting party wants the document, that party must ask for copies. Mr. Sykes commented that if a party gets a request for admission of the genuineness of ESI, and the other parties do not have the ESI, they cannot make a judgment and make use of the admission. The Vice Chair reiterated that the non-requesting parties did not ask for it.

Mr. Sykes observed that the documents are part of the case and so are the answers that others use. ESI is more difficult because others cannot use it. The problem is the difference between ESI and other documents. Mr. Klein stated that if people want ESI, they can ask for it. Mr. Brault added that the principle exists now. The Rules should not require that someone other than the requesting party receives the ESI.

Mr. Sykes remarked that in his experience, requests for admission are served on all parties, and the response is served on all parties. He reiterated that with ESI, it may be difficult to understand the response. The Vice Chair said that this is the same in any situation in which one party is asked for a certain report, and the other parties did not ask for it. Mr. Michael pointed out that in Rule 2-421, answers to interrogatories are sent to all parties. In answer to Mr. Sykes' question, when there are multiple parties in a case and ESI is requested, the

Rule could be changed to require that the ESI be sent to the requesting party and the other co-parties. The Vice Chair said that in response to a request for documents, a refusal to provide the documents gets mailed to all parties. The parties must ask for paper and ESI when requesting to look at materials. Mr. Brault noted that Fed. R. Civ. P. 45 does not require that parties who did not subpoena information be provided with the information.

Professor McLain commented that it is more difficult to authenticate ESI because of its volatile nature. Ms. Ogletree suggested that one could keep a copy of the ESI that was disseminated. Professor McLain added that the copy of the ESI could be attached. The Vice Chair said that this is not necessary; the responding party can state that the ESI was provided on a date certain. Mr. Klein reiterated that it is not necessary to attach the documents. Mr. Brault asked how the ESI is introduced into evidence at trial. Mr. Klein replied that it is printed before it is distributed. Mr. Brault commented that the parties may not have seen the ESI, the problem pointed out by Mr. Sykes. The Vice Chair answered that they did not ask for it. Mr. Klein added that this principle also applies to paper documents. Mr. Johnson pointed out that at the scheduling conference with the parties, the discovery issues can be raised. By consensus, the Committee approved the Rule as presented.

After a break for lunch, Mr. Klein presented Rule 2-433, Sanctions, for the Committee’s consideration.

AMEND Rule 2-433 to add a new section (b) pertaining to loss of electronically stored information and to add a Comment to the Rule, as follows:

Rule 2-433. SANCTIONS

(a) For Certain Failures of Discovery

Upon a motion filed under Rule 2-432 (a), the court, if it finds a failure of discovery, may enter such orders in regard to the failure as are just, including one or more of the following:

(1) An order that the matters sought to be discovered, or any other designated facts shall be taken to be established for the purpose of the action in accordance with the claim of the party obtaining the order;

(2) An order refusing to allow the failing party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; or

(3) An order striking out pleadings or parts thereof, or staying further proceeding until the discovery is provided, or dismissing the action or any part thereof, or entering a judgment by default that includes a determination as to liability and all relief sought by the moving party against the failing party if the court is satisfied that it has personal jurisdiction over that party. If, in order to enable the court to enter default judgment, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any

matter, the court may rely on affidavits, conduct hearings or order references as appropriate, and, if requested, shall preserve to the plaintiff the right of trial by jury.

Instead of any order or in addition thereto, the court, after opportunity for hearing, shall require the failing party or the attorney advising the failure to act or both of them to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(b) For Loss of Electronically Stored Information

Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operations of an electronic information system.

~~(b)~~ (c) For Failure to Comply with Order Compelling Discovery

If a person fails to obey an order compelling discovery, the court, upon motion of a party and reasonable notice to other parties and all persons affected, may enter such orders in regard to the failure as are just, including one or more of the orders set forth in section (a) of this Rule. If justice cannot otherwise be achieved, the court may enter an order in compliance with Rule 15-206 treating the failure to obey the order as a contempt.

~~(c)~~ (d) Award of Expenses

If a motion filed under Rule 2-432 or under Rule 2-403 is granted, the court, after opportunity for hearing, shall require the party or deponent whose conduct necessitated the motion or the party or the attorney advising the conduct or both of them to pay to the moving party the reasonable expenses

incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court, after opportunity for hearing, shall require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 422 c 1 and 2.
Section (b) is derived from the 2006 version of Fed. R. Civ. P. 37 (f).
Section ~~(b)~~ (c) is derived from former Rule 422 b.
Section ~~(c)~~ (d) is derived from the 1980 version of Fed. R. Civ. P. 37 (a) (4) and former Rule 422 a 5, 6 and 7.

COMMENT

The addition of section (b) focuses on a distinctive feature of computer operations, the routine alteration and deletion of information that goes along with ordinary use. Many steps essential to computer operation may alter or destroy information for reasons that have nothing to do with how that information might relate to litigation. The new language applies only to information lost due to the routine operation of an electronic information system, only if the operation was in good faith. This means that

> a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. Whether good faith would call for steps to prevent the loss of information on sources that the party believes are not reasonably accessible under Rule 2-402 (b)(1) depends on the circumstances of each case. The Rule restricts the imposition of sanctions, but it does not prevent a court from making the kinds of adjustments frequently used in managing discovery if a party is unable to provide relevant responsive information.

Mr. Klein explained that section (b) was added as a "safe harbor" principle, one that is a mainstay of the federal rule process. It offers protection for good faith operations of an electronic information system and is derived from Fed. R. Civ. P. 37. Mr. Johnson asked if the exceptional circumstances to which the Rule refers are left to determination by case law. This concept could lead to bludgeoning using a spoliation argument. The Vice Chair noted that the federal rule warns against altering information in the ordinary course of business. Mr. Sykes commented that the information may have been discarded, destroyed, lost, or misplaced. It may be better to say that the information is no longer available. This can be considered by the Style Subcommittee. By consensus, the Committee approved the Rule as presented, subject to being styled.

Mr. Klein presented Rule 2-504, Scheduling Order, for the Committee's consideration.

AMEND Rule 2-504 to add a new subsection (b)(2)(G) referring to discovery of electronically stored information, to add a new subsection (b)(2)(H) referring to a process for asserting claims of privilege or of protection of trial-preparation material, to reletter subsection (b)(2) and to add a Comment to the Rule, as follows:

Rule 2-504. SCHEDULING ORDER

(a) Order Required

(1) Unless otherwise ordered by the County Administrative Judge for one or more specified categories of actions, the court shall enter a scheduling order in every civil action, whether or not the court orders a scheduling conference pursuant to Rule 2-504.1.

(2) The County Administrative Judge shall prescribe the general format of scheduling orders to be entered pursuant to this Rule. A copy of the prescribed format shall be furnished to the Chief Judge of the Court of Appeals.

(3) Unless the court orders a scheduling conference pursuant to Rule 2-504.1, the scheduling order shall be entered as soon as practicable, but no later than 30 days after an answer is filed by any defendant. If the court orders a scheduling conference, the scheduling order shall be entered promptly after conclusion of the conference.

(b) Contents of Scheduling Order

(1) Required

A scheduling order shall contain:

(A) an assignment of the action to an appropriate scheduling category of a differentiated case management system established pursuant to Rule 16-202;

(B) one or more dates by which each party shall identify each person whom the party expects to call as an expert witness at trial, including all information specified in Rule 2-402 (f) (1);

(C) one or more dates by which each party shall file the notice required by Rule 2-504.3 (b) concerning computer-generated evidence;

(D) a date by which all discovery must be completed;

(E) a date by which all dispositive motions must be filed; and

(F) any other matter resolved at a scheduling conference held pursuant to Rule 2-504.1.

(2) Permitted

A scheduling order may also contain:

(A) any limitations on discovery otherwise permitted under these rules, including reasonable limitations on the number of interrogatories, depositions, and other forms of discovery;

(B) the resolution of any disputes existing between the parties relating to discovery;

(C) a date by which any additional parties must be joined;

(D) a specific referral to or direction to pursue an available and appropriate form of alternative dispute resolution, including a requirement that individuals with authority to settle be present or readily available for consultation during the alternative dispute resolution proceeding, provided that the referral or direction conforms to the

limitations of Rule 2-504.1 (e);

(E) an order designating or providing for the designation of a neutral expert to be called as the court's witness;

(F) a further scheduling conference or pretrial conference date; ~~and~~

(G) provisions for discovery of electronically stored information;

(H) a process by which the parties may assert claims of privilege or of protection of trial-preparation material after production; and

~~(G)~~ (I) any other matter pertinent to the management of the action.

Cross reference: See Rule 5-706 for authority of the court to appoint expert witnesses.

Source: This Rule is in part new and in part derived as follows:
Subsection (b)(2)(G) is derived from the 2006 version of Fed. R. Civ. P. 16 (b)(5).
Subsection (b)(2)(H) is derived from the 2006 version of Fed. R. Civ. P. 16 (b)(6).

COMMENT

The amendment to Rule 2-504 (b)(2) is designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if this discovery is expected to occur. It also adds to the list of topics that may be addressed in the scheduling order a process by which the parties may assert claims of privilege or of protection of trial-preparation material after production. The federal rule uses the language "any agreements the parties reach for asserting claims of privilege ...," but Rule 2-504 (b)(2)(H) broadens this concept to include any process for asserting claims of privilege or of protection of trial-preparation

material to be added to the scheduling order.

Mr. Klein pointed out that subsection (b)(2) contains two new provisions, (G) and (H), that are permitted in a scheduling order. They encourage the parties to discuss how to facilitate discovery of ESI and enter into agreements, such as "quick peek" and "clawback" agreements, pertaining to the assertion of claims of privilege or of protection of trial preparation material after production. By consensus, the Committee approved the Rule as presented.

Mr. Klein presented Rule 2-504.1, Scheduling Conference, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-504.1 by adding language to subsection (b)(1) referring to issues relating to preserving discoverable information, discovery of electronically stored information, and claims of privilege or protection of trial-preparation materials; by relettering subsection (b)(1); by adding a Committee note after subsection (b)(2) that provides (1) examples of matters that may be considered at a scheduling conference relating to electronically stored information and (2) an explanation about requesting metadata; and by adding a Comment to the Rule, as follows:

Rule 2-504.1. SCHEDULING CONFERENCE

(a) When Required

In any of the following circumstances, the court shall issue an order requiring the parties to attend a scheduling conference:

(1) in an action placed or likely to be placed in a scheduling category for which the case management plan adopted pursuant to Rule 16-202 b requires a scheduling conference;

(2) in an action in which an objection to computer-generated evidence is filed under Rule 2-504.3 (d); or

(3) in an action, in which a party requests a scheduling conference and represents that, despite a good faith effort, the parties have been unable to reach an agreement (i) on a plan for the scheduling and completion of discovery, (ii) on the proposal of any party to pursue an available and appropriate form of alternative dispute resolution, or (iii) on any other matter eligible for inclusion in a scheduling order under Rule 2-504.

(b) When Permitted

The court may issue an order in any action requiring the parties to attend a scheduling conference.

(c) Order for Scheduling Conference

An order setting a scheduling conference may require that the parties, at least ten days before the conference:

(1) complete sufficient initial discovery to enable them to participate in the conference meaningfully and in good faith and to make decisions regarding (A) settlement, (B) consideration of available and appropriate forms of alternative dispute resolution, (C) limitation of issues, (D) stipulations, (E) any issues relating to preserving discoverable information, (F) any issues relating to discovery of electronically stored information, including the form or forms in which it should be produced, (G) any issues relating to claims of privilege or protection of trial-preparation materials, and ~~(E)~~ (H) other

matters that may be considered at the conference; and

(2) confer in person or by telephone and attempt to reach agreement or narrow the areas of disagreement regarding the matters that may be considered at the conference and determine whether the action or any issues in the action are suitable for referral to an alternative dispute resolution process in accordance with Title 17, Chapter 100 of these rules.

Committee note: In an action in which discovery of electronically stored information is expected, examples of matters that may be considered at a scheduling conference include the following topics relating to electronically stored information:

(1) its identification and retention;

(2) the format of production, such as PDF, TIFF, or JPEG files, or native format, for example, Microsoft Word, Excel, etc.;

(3) the manner of production, such as CD-ROM disks;

(4) any production of indices;

(5) any electronic numbering of documents and information;

(6) apportionment of costs for production of electronically stored information not reasonably accessible because of undue burden or cost;

(7) a process by which the parties may assert claims of privilege or of protection of trial-preparation materials after production; and

(8) whether the parties agree to refer discovery disputes to a Special Master.

The parties may also need to address any request for metadata. Unless it is material to resolving the dispute, generally speaking,

there is no obligation to preserve and produce metadata. See, The Sedona Conference, *The Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic Document Production,* 2005, Principle 12 and related Comment. Absent a court order or agreement of the parties otherwise, the producing party should have the option of producing all, some, or none of the metadata, unless the producing party knows or should reasonably know that particular metadata is relevant to the dispute. If a party disputes a specific request for metadata, the party should either timely object or seek a protective order if the issue cannot be resolved through dialogue with the requesting party. See, id., Comment 12 a. For a definition of "metadata," see, id., Appendix A (Glossary).

(d) Time and Method of Holding Conference

Except (1) upon agreement of the parties, (2) upon a finding of good cause by the court, or (3) in an action assigned to a family division under Rule 16-204 (a) (2), a scheduling conference shall not be held earlier than 30 days after the date of the order. If the court requires the completion of any discovery pursuant to section (c) of this Rule, it shall afford the parties a reasonable opportunity to complete the discovery. The court may hold a scheduling conference in chambers, in open court, or by telephone or other electronic means.

(e) Scheduling Order

Case management decisions made by the court at or as a result of a scheduling conference shall be included in a scheduling order entered pursuant to Rule 2-504. A court may not order a party or counsel for a party to participate in an alternative dispute resolution process under Rule 2-504 except in accordance with Rule 9-205 or Rule 17-103.

Source: This Rule is new.

COMMENT

The amendments to Rule 2-504.1 (c) direct the parties to discuss discovery of electronically stored information during their scheduling conference. When parties anticipate such discovery, discussion at the outset may avoid later difficulties or ease their resolution. When a case involves discovery of electronically stored information, the issues to be addressed during the scheduling conference depend on the nature and extent of the contemplated discovery and of the parties' information systems. The requirement that the parties discuss any issues regarding preservation of discoverable information is particularly important with regard to electronically stored information, the volume and dynamic nature of which may complicate preservation obligations. New language has been added providing that the parties should discuss any issues relating to assertions of privilege or of protection as trial-preparation materials. See the Commentary to Rule 2-402 for a discussion of certain protocols to minimize the risk of waiver of privilege or of protection as trial-preparation materials.

Mr. Klein told the Committee that subsection (c)(1) contains additional items pertaining to "quick peek" and "clawback" agreements. The new provisions will encourage the parties to discuss these. The new Committee note is derived from the Guidelines in the Business and Technology Track. The Subcommittee modified a sample order to make the Rule applicable to ESI. The new second paragraph referring to "metadata" is taken from material generated by the Sedona Conference.

The Vice Chair suggested that number (8) in the list in the Committee note be deleted. Judge Matricciani inquired as to why this should be deleted. The Vice Chair said she questioned whether the court has the authority to delegate discovery

disputes to a special master. Ms. Ogletree responded that Rule 2-541, Masters, provides for this. By consensus, the Committee approved the Rule as presented.

Mr. Klein presented Rule 2-510, Subpoenas, for the Committee's consideration.

~~**QUERY TO RULES COMMITTEE: To what extent should the Rules in Title 3 (Rule 3-510 and Title 3, Chapter 400) and the Rules in Title 4 (Rules 4-261 through 4-266) be amended to conform to the proposed changes to the Title 2 Rules?**~~

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-510 by adding language to section (a) referring to electronically stored information and testing or sampling of documents; by adding language to section (c) referring to electronically stored information, a description of testing or sampling, and the fact that a subpoena may specify the form of electronically stored information; by adding a cross reference at the end of section (d) to a certain Code provision; by adding a new section (e) pertaining to the duties required in responding to a subpoena; by adding language to section (f) referring to electronically stored information; by adding language to section (g) referring to electronically stored information; by adding language to section (h) referring to filing objections to producing electronically stored information; by adding taglines to section (i); by changing the term "x-ray films" to "diagnostic imaging studies" and the term "patient" to "person in interest" in section (i); by adding a cross reference to a certain

Code provision at the end of subsection (i)(1), by adding language referring to the requirement to state with specificity the reason for the presence of the custodian in court in section (i); by adding a new section (j) pertaining to records of fiduciary institutions; by relettering the Rule; and by adding a Comment to the Rule; as follows:

Rule 2-510. SUBPOENAS

(a) Use

A subpoena is required to compel the person to whom it is directed to attend, give testimony, and produce designated documents, electronically stored information, or ~~other~~ tangible things at a court proceeding, including proceedings before a master, auditor, or examiner. A subpoena is also required to compel a nonparty and may be used to compel a party over whom the court has acquired jurisdiction to attend, give testimony, and produce and permit inspection, ~~and~~ copying, testing, or sampling of designated documents, electronically stored information, or ~~other~~ tangible things at a deposition. A subpoena shall not be used for any other purpose. If the court, on motion of a party alleging a violation of this section or on its own initiative, after affording the alleged violator a hearing, finds that a party or attorney used or attempted to use a subpoena for a purpose other than a purpose allowed under this section, the court may impose an appropriate sanction upon the party or attorney, including an award of a reasonable attorney's fee and costs, the exclusion of evidence obtained by the subpoena, and reimbursement of any person inconvenienced for time and expenses incurred.

(b) Issuance

On the request of a person entitled to the issuance of a subpoena, the clerk shall issue a completed subpoena, or provide a blank form of subpoena which shall be filled

in and returned to the clerk to be signed and sealed before service. On the request of an attorney or other officer of the court entitled to the issuance of a subpoena, the clerk shall issue a subpoena signed and sealed but otherwise in blank, which shall be filled in before service.

(c) Form

Every subpoena shall contain: (1) the caption of the action, (2) the name and address of the person to whom it is directed, (3) the name of the person at whose request it is issued, (4) the date, time, and place where attendance is required, (5) a description of any documents, electronically stored information, or ~~other~~ tangible things to be produced and if testing or sampling is to occur, a description of the proposed testing or sampling procedure, and (6) when required by Rule 2-412 (d), a notice to designate the person to testify. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(d) Service

A subpoena shall be served by delivering a copy to the person named or to an agent authorized by appointment or by law to receive service for the person named or as permitted by Rule 2-121 (a)(3). Service of a subpoena upon a party represented by an attorney may be made by service upon the attorney under Rule 1-321 (a). A subpoena may be served by a sheriff of any county or by any person who is not a party and who is not less than 18 years of age. Unless impracticable, a party shall make a good faith effort to cause a trial or hearing subpoena to be served at least five days before the trial or hearing.

Cross reference: See Code, Courts Article, §6-410, concerning service upon certain persons other than the custodian of public records named in the subpoena if the custodian is not known and cannot be ascertained after a reasonable effort. As to

additional duties for serving subpoenas, see Code, Health General Article, §4-306 (b)(6) and Code, Financial Institutions Article, §1-304.

(e) Duties in Responding to a Subpoena

(1) Generally

A person responding to a subpoena to produce documents or electronically stored information:

(A) shall produce the documents or information as they are kept in the usual course of business or shall organize and label the documents or information to correspond with the categories in the demand, except as provided in subsection (e)(2)(B) of this Rule;

(B) if a subpoena does not specify the form or forms for producing electronically stored information, shall produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable;

(C) need not produce the same electronically stored information in more than one form; and

(D) need not provide discovery of electronically stored information from sources that the person identified as not reasonably accessible because of undue burden or cost, provided that the person states the reasons the person contends that production of the identified source would cause undue burden or cost. On a motion to compel discovery or to quash, the person from whom discovery is sought shall show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court nonetheless may order discovery and may specify the conditions for discovery, including cost allocation.

Committee note: A responding party should produce electronically stored information that is relevant, not privileged, and

reasonably accessible, subject to the limitations set out in subsection (b)(2) of Rule 2-402 that apply to all discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching not producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

(2) Information Withheld

When information subject to a subpoena is withheld on a claim that is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, electronically stored information, or things not produced that is sufficient to enable the demanding party to contest the claim.

(3) Information Produced

If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, then the person making the claim shall notify any party that received the information of the claim and the basis for it within a reasonable time. After being notified, a party shall promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. If a receiving party wishes to determine the validity of a claim of privilege, it shall promptly file a motion under seal requesting that the court determine the validity of the claim. If a receiving party disclosed the information before being notified, it shall take reasonable steps to retrieve it. The person who produced the information shall preserve it until the claim is resolved.

~~(e)~~ (f) Objection to Subpoena for Court

Proceedings

On motion of a person served with a subpoena to attend a court proceeding (including a proceeding before a master, auditor, or examiner) filed promptly and, whenever practicable, at or before the time specified in the subpoena for compliance, the court may enter an order that justice requires to protect the person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the subpoena be quashed or modified;

(2) that the subpoena be complied with only at some designated time or place other than that stated in the subpoena;

(3) that documents, electronically stored information, or ~~other~~ tangible things designated in the subpoena be produced only upon the advancement by the party serving the subpoena of the reasonable costs of producing them; or

(4) that documents, electronically stored information, or ~~other~~ tangible things designated in the subpoena be delivered to the court at or before the proceeding or before the time when they are to be offered in evidence, subject to further order of court to permit inspection of them.

~~(f)~~ (g) Objection to Subpoena for Deposition

A person served with a subpoena to attend a deposition may seek a protective order pursuant to Rule 2-403. If the subpoena also commands the production of documents, electronically stored information, or ~~other~~ tangible things at the deposition, the person served may seek a protective order pursuant to Rule 2-403 or may file, within ten days after service of the subpoena, an objection to production of any or all of the designated materials. The objection shall be in writing and shall state the reasons for

the objection. If an objection is filed, the party serving the subpoena is not entitled to production of the materials except pursuant to an order of the court from which the subpoena was issued. At any time before or within 15 days after completion of the deposition and upon notice to the deponent, the party serving the subpoena may move for an order to compel the production.

~~(g)~~ (h) Protection of Persons Subject to Subpoenas

A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. Subject to subsections (e)(2) and (e)(3) of this Rule, a person directed to produce and permit inspection, copying, testing, or sampling may, within 15 days after service of the subpoena or before the time specified for compliance if fewer than 15 days after service, serve upon the party or attorney designated in the subpoena a written objection to producing any or all of the designated materials or inspection of the premises or to producing electronically stored information in the form or forms requested. If an objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials, or inspect the premises, except pursuant to an order of the court from which the subpoena was issued. If an objection has been made, the party serving the subpoena may, upon notice to the person to whom it is directed, move at any time for an order to compel the production, inspection, copying, testing, or sampling. The order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling requested.

Cross reference: For the availability of sanctions for violations of this section, see Rules 1-201 (a) and 1-341.

~~(h)~~ (i) Records of Health Care Providers

(1) Generally

A health care provider, as defined by Code, Courts Article, §3-2A-01 (e), served with a subpoena to produce at trial records, including ~~x-ray films~~ diagnostic imaging studies, relating to the condition or treatment of a ~~patient~~ person in interest may comply by delivering the records to the clerk of the court that issued the subpoena at or before the time specified for production. The health care provider may produce exact copies of the records designated unless the subpoena specifies that the original records be produced. The records shall be delivered in a sealed envelope labeled with the caption of the action, the date specified for production, and the name and address of the person at whose request the subpoena was issued. The records shall be accompanied by a certificate of the custodian that they are the complete records for the patient for the period designated in the subpoena and that the records are maintained in the regular course of business of the health care provider. The certification shall be prima facie evidence of the authenticity of the records.

Cross reference: Code, Health-General Article, §4-306 (b)(6).

(2) During Trial

Upon commencement of the trial, the clerk shall release the records only to the courtroom clerk assigned to the trial. The courtroom clerk shall return the records to the clerk promptly upon completion of trial or at an earlier time if there is no longer a need for them. Upon final disposition of the action the clerk shall return the original records to the health care provider but need not return copies.

(3) Presence of Custodian

When the actual presence of the custodian of medical records is required, the subpoena shall ~~so~~ state with specificity the reason for the presence of the custodian.

Cross reference: Code, Courts Article, §10-104 includes an alternative method of authenticating medical records in certain cases transferred from the District Court upon a demand for a jury trial. ~~Code, Health-General Article, §4-306 requires that a subpoena to produce medical records without the authorization of a person in interest be accompanied by a certification that a copy of the subpoena has been served on the person whose records are being sought or that the court has waived service for good cause.~~

(j) Records of Fiduciary Institutions

(1) Generally

A fiduciary institution, as defined by Code, Financial Institutions Article, §1-301 (b), served with a subpoena to produce at trial records of its customers may comply by delivering the records to the clerk of the court that issued the subpoena within 30 days of receipt of the subpoena. The fiduciary institution shall mail a copy of the subpoena to the accountholder(s) at the address on file. The fiduciary institution may produce exact copies of the records designated unless the subpoena specifies that the original records be produced. The records shall be delivered in a sealed envelope labeled with the caption of the action, the date specified for production, and the name and address of the person at whose request the subpoena was issued. The records shall be accompanied by a certificate of the custodian that (A) they are the records for the customer designated in the subpoena, (B) that the records are maintained in the regular course of business of the fiduciary institution and (C) that a copy of the subpoena has been mailed to the accountholder(s) at the address on file. The certification shall be prima facie evidence of the authenticity of the records.

Cross reference: Code, Financial Institutions Article, §1-304.

(2) During Proceeding

Upon commencement of the proceeding for which the records have been subpoenaed, the clerk shall release the records only to the courtroom clerk assigned to that proceeding. The courtroom clerk shall return the records to the clerk promptly upon completion of the proceeding or at an earlier time if there is no need for them. Upon final disposition of the action the clerk shall return the records to the fiduciary institution but need not return copies.

(3) Presence of Custodian

When the actual presence of the custodian of records of a fiduciary institution is required, the subpoena shall state with specificity the reason for the presence of the custodian.

~~(i)~~ (k) Attachment

A witness served with a subpoena under this Rule is liable to body attachment and fine for failure to obey the subpoena without sufficient excuse. The writ of attachment may be executed by the sheriff or peace officer of any county and shall be returned to the court issuing it. The witness attached shall be taken immediately before the court if then in session. If the court is not in session, the witness shall be taken before a judicial officer of the District Court for a determination of appropriate conditions of release to ensure the witness' appearance at the next session of the court that issued the attachment.

Source: This Rule is derived as follows:
Section (a) is new but the second sentence is derived in part from former Rule 407 a.
Section (b) is new.
Section (c) is derived from former Rules 114 a and b, 115 a and 405 a 2 (b).
Section (d) is derived from former Rules 104 a and b and 116 b.
Section (e) is derived from the 2006 version of Fed. R. Civ. P. 45 (d).
Section ~~(e)~~ (f) is derived from former Rule 115 b.
Section ~~(f)~~ (g) is derived from the 1980

version of Fed. R. Civ. P. 45 (d) (1).

Section ~~(g)~~ (h) is derived from the 1991 version of Fed. R. Civ. P. 45 (c) (1) and the 2006 version of Fed. R. Civ. P. 45 (c)(2).

Section ~~(h)~~ (i) is new.

Section (j) is new.

Section ~~(i)~~ (k) is derived from former Rules 114 d and 742 e.

COMMENT

Section (a) is amended to recognize that electronically stored information as defined in Rule 2-422 (a) can also be sought by subpoena. Section (h) is amended, as in Rule 2-422 (d), to provide that if the subpoena does not specify the form or forms for electronically stored information, the person served with the subpoena must produce electronically stored information in a form or forms in which it is usually maintained or in a form or forms that are reasonably usable.

As with discovery of electronically stored information from parties, complying with a subpoena for such information may impose burdens on the responding person. Section (h) provides protection against undue impositions on nonparties. An order to compel production shall protect any person who is not a party from significant expense resulting from the inspection, copying, testing, or sampling requested.

Section (a) of Rule 2-510 is also amended, as in Rule 2-422 (a), to provide that a subpoena is available to permit testing and sampling as well as inspection and copying. As in Rule 2-422, this change recognizes that in some circumstances the opportunity to perform testing or sampling may be important, both for documents and for electronically stored information. In light of this, section (c) is changed to include a description of electronically stored information and a description of a proposed testing or sampling procedure as items to add to the subpoena itself. As in Rule 2-422

(b), language has been added to provide that a subpoena may specify the form or forms in which electronically stored information is to be produced. Because testing and sampling may present particular issues of burden or intrusion for the person served with the subpoena, the protective provisions of section (h) must be enforced when these demands are made. Inspection or testing of certain types of electronically stored information or of a person's electronic information system may raise issues of confidentiality or privacy. "Inspection" should be the exception and not the Rule for the subpoenaing of electronically stored information just as it is with respect to discovery of electronically stored information under Rule 4-222. See the Comment to section (a) of Rule 4-222.

The amendments to section (e) largely parallel the amendments to subsection (b)(1) of Rule 2-402 in addressing issues raised by difficulties in providing discovery of electronically stored information because of undue burden or cost. However, as already provided in subsection (h), a person responsible for issuance of a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. Indeed, a witness' nonparty status is an important factor to be considered in determining whether to allocate costs on the demanding or producing party. See, *United States v. Columbia Broad. Sys., Inc.*, 666 F 2d 364, 371 (9th Cir.), *cert. denied*, 457 U.S. 1118 (1982). Whether a subpoena imposes an undue burden on a third party should be determined on a case-by-case analysis of factors such as: relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described, the extent to which the producing party must separate responsive from privileged or irrelevant matter, the burden imposed, the possibility of decreasing the burden through an appropriate protective order, the financial resources of the nonparty, the interest of the nonparty in the

final outcome of the litigation, and the reasonableness of the expenses involved in making the production. See, The Sedona Conference, *The Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic Document Production,* 2005, Comment 13 c.

Section (e) is also amended, as is Rule 2-402 (b)(1), to add a procedure for assertion of privilege or of protection as trial-preparation materials after production. The responding party may submit the information to the court for resolution of the privilege claim, as under Rule 2-402 (e)(2). If information is produced in response to a subpoena that is subject to a claim of privilege or protection as trial-preparation material, the person making the claim shall notify a party that received the information within a reasonable time after the information was produced, and the person making the claim. This language conforms to the language in *Elkton Care Center Associates v. Quality Care Management, Inc.*, 145 Md. App. 532 (2002). Preservation and waiver of privilege and work product protection are matters of substantive, not procedural law. The restrictions in Rule 2-402 (e)(2) also apply to Rule 2-510 (e)(3).

Rule 2-510 was accompanied by the following Reporter's Note.

The Discovery Subcommittee recommends the addition of section (e), new language in section (h), and conforming changes to sections (a), (c), (f), and (g) in its efforts to make the Rules of Procedure applicable to electronic discovery. Part of section (e) is derived from proposed changes to Fed. R. Civ. P. 45 (d), and part of the new language in section (h) is derived from proposed changes to Fed. R. Civ. P. 45 (c).

The Trial Subcommittee recommends additional changes to Rule 2-510, consisting of amendments to section (i), Records of Health Care Providers, and the addition of new section (j), Records of Fiduciary Institutions.

In section (i), the word "patient" has been changed to the term "person in interest" to comply with Code, Health General, §4-306, which provides that a person in interest, defined in §4-301 as an adult on whom a health case provider maintains a medical record; a person authorized to consent to health care for an adult; a personal representative of a deceased person; a minor who has the statutory right to consent to medical treatment; a parent, guardian, custodian, or representative of a minor designated by the court; a parent of a minor whose authority has not been specifically limited by law; or an attorney appointed by an adult on whom a medical provider maintains a medical record, may object to disclosure of medical records. The language "x-ray films" has been changed to "diagnostic imaging studies" which covers x-rays as well as more up-to-date procedures such as CAT scans and MRI's. In subsection (i)(3), the language referencing Code, Health General Article, §4-306 has been moved to the cross reference after section (d), a place that the Subcommittee felt was more appropriate. Subsection (i)(3) adds the same specificity requirement for subpoenas requesting the actual presence of the custodian of the medical record as in new subsection (j)(3).

Representatives of the banking industry have requested a new provision to be added to Rule 2-510 which would allow banks to respond to a subpoena for records by providing the records to the clerk, a procedure similar to the procedure for responding to a subpoena for medical records set out in section (i) of Rule 2-510. In response, the Trial Subcommittee recommends the addition of section (j).

NOTE: If the amendments to Rule 2-510 are approved conforming amendments to Rules 2-432 (b)(1)(G), 16-732 (d), 16-806 (b)(2), and Bar Admission Rule 22 (b) also must be made.

Mr. Klein explained that the Rule is proposed to be amended

to cover ESI as well as subpoenas to financial institutions. The latter is designed to parallel subpoenas to health care providers. Many of the suggested changes pertaining to subpoena for ESI are parallel to the changes to Rule 2-402, and the concepts come from the federal rules. Section (c) contains changes similar to those in Rule 2-422. Section (e) is similar to the changes in Rule 2-402. Furthermore, new language in the Rule provides protections for non-parties whose information is being subpoenaed.

Mr. Klein suggested that in subsection (e)(1)(D), the words "provide discovery" be changed to the word "produce." By consensus, the Committee agreed with this suggestion. Mr. Klein noted that the language at the end of subsection (e)(1)(D) must be conformed to the changes made to the parallel language in Rule 2-402 (b)(1). Section (h) has new language providing a time frame to object to the subpoena. Judge Matricciani asked whether a third party would have to attend a court proceeding to object, and Mr. Klein replied that a letter may suffice.

The Vice Chair suggested that the Rule should be divided to address subpoenas for depositions and subpoenas for trial, since the process for each is different. Section (f) pertains to objections to subpoenas for court proceedings. Mr. Klein said that the focus is on objecting to providing information, not on objecting to a subpoena for the body of a person. The Vice Chair remarked that if one objects to a subpoena for court proceedings, one would file a motion. If the objection was to a subpoena to

attend a deposition, one would ask for a protective order. If there is an objection, the burden is on the party serving the subpoena to get an order of court. This does not have to be changed to apply to ESI. Mr. Klein noted that non-parties are not subject to the Rules of Procedure in the manner that parties are. Mr. Brault commented that a ruling compelling a non-party to produce documents or attend a proceeding is a final judgment for appeal purposes. Mr. Klein said that the Subcommittee did not discuss the fact that the timing is different for court proceedings and depositions. Mr. Brault pointed out that section (g) provides that a person served with a subpoena to attend a deposition may seek a protective order. The Vice Chair stated that the Style Subcommittee will style the new language in section (h).

The Vice Chair noted that the changes to section (i) are not related to ESI but pertain to subpoenas of health care providers. The banking community requested the changes set forth as new section (j). The concept is that procedures with respect to subpoenaed records of financial institutions will be similar to subpoenas of records of health care providers. The issue is that it is not necessary to require the custodian of records to appear in court for trials at which the records have been subpoenaed. She suggested that there be general language applying to anyone who is asked to produce records. Judge Matricciani observed that subsection (j)(3) implies that the presence of the custodian of records is not usually required. Mr. Klein responded that the

purpose of that provision is to require the party who requested the subpoena to articulate the reasons the custodian must be present in court. Judge Matricciani remarked that challenges to the authenticity of records are rare. Mr. Bowen noted that a custodian can move to quash his or her appearance. Ms Potter asked whether this applies to attendance at trial only, and the Vice Chair replied in the affirmative.

Professor McLain inquired as to whether this relates to section (b) of Rule 5-902, Self-authentication. Section (b) is entitled "Certified Records of Regularly Conducted Business Activity." Ms. Ogletree suggested that the language of subsection 5-902 (b) could be tracked in subsection (j)(3).

Mr. Brownlee addressed the Committee. He said that he is representing the Maryland Bankers' Association, which had requested the change to the Rule. He explained that banks get many subpoenas requiring an employee to come to court with the bank records. If the custodian speaks with the requesting party, he or she may not have to attend the hearing. In court, the custodian only has to assert that the records are kept in the usual course of business. When the custodian is required to come to court, this becomes complicated, as it may involve attending two or three court hearings in several different counties each day. The Vice Chair remarked that this a waste of time and resources.

Mr. Brault noted that if the Rule is changed to cover anyone who delivers records, it must specifically address Code,

Financial Institutions Article, §1-304 and Code, Health General Article, §4-306, concerning notice to the person whose records have been subpoenaed. The Vice Chair observed that section (i) does not provide for service of the subpoena on the patient, but section (j) expressly provides for service on the accountholder. Ms. Potter asked about notifying others, and the Vice Chair replied that only the person in interest in a health care proceeding and the accountholder in a proceeding involving the records of a financial institution are notified. The notification requirements are statutorily created. There are differences between financial institution record subpoenas and health care record subpoenas. Section (j) states that a financial institution is to deliver the records to the clerk of the court that issued the subpoena within 30 days of receipt of the subpoena. Section (i) provides that health care records are to be delivered to the clerk of the court that issued the subpoena at or before the time specified for production. Ms. Ogletree remarked that discovery subpoenas require a response in 30 days. Mr. Brault noted that non-parties who are subpoenaed have the same rights as parties. He suggested that section (j) use the language of section (i) that reads: "...at or before the time specified in the subpoena." He also suggested that the beginning of the fifth sentence of section (j) read as follows: "The records shall be accompanied by a certificate of the custodian that (A) they are the complete records, (B)...".

Mr. Brownlee pointed out that financial institution records

include the accountholder's canceled checks from the beginning of opening the account. These may be very expansive. Often, the custodian can narrow the request by talking to the attorney who requested the records. He suggested that the wording could be "the complete records unless otherwise designated." The records should be accompanied by a certificate of the custodian that they are the records agreed to. The Vice Chair commented that health care records should not be treated differently than records of financial institutions. Professor McLain suggested that the language in the fifth sentence of subsection (j)(1) that reads "for the customer" should be deleted. Ms. Ogletree suggested the language "complete records requested," and the Committee agreed by consensus to this suggestion. By consensus, the Committee approved the Rule as amended subject to sections (i) and (j) being collapsed into one section applicable to all records.

Mr. Klein presented Rule 5-502, Attorney-Client Privilege and Work Product: Limitations on Waiver, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 500 - PRIVILEGES

ADD new Rule 5-502, as follows:

Rule 5-502. ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT: LIMITATIONS ON WAIVER

(a) Definitions

As used in this Rule:

(1) Attorney-client Privilege

"Attorney-client privilege" means the protection provided for confidential attorney-client communications under applicable law.

(2) Work Product Protection

"Work product protection" means the protection for materials prepared in preparation of litigation or for trial, under applicable law.

(b) Scope of Waiver

The waiver by disclosure of an attorney-client privilege or work product protection extends to an undisclosed communication or information concerning the same subject matter only if that undisclosed communication or information ought in fairness to be considered with the disclosed communication or information.

(c) Inadvertent Disclosure

A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver in a state or federal proceeding if the disclosure is inadvertent and is made in connection with state or federal litigation or administrative proceedings –- and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Rule 2-402 (e)(2).

(d) Controlling Effect of Court Orders

A court order that the attorney-client privilege or work product protection is not waived as a result of disclosure in connection with the litigation pending before

the court governs all persons or entities in all state or federal proceedings, whether or not they were parties to the matter before the court, if the order incorporates the agreement of the parties before the court.

(e) Controlling Effect of Party Agreements

An agreement on the effect of disclosure of a communication or information covered by the attorney-client privilege or work product protection is binding on the parties to the agreement but not on other persons unless the agreement is incorporated into a court order.

Source: This Rule is new.

COMMENT

Rule 5-502 is derived from proposed Federal Rule of Evidence 502, which currently has been submitted for public comment as part of the federal rule-making process.[1] The Maryland Rule concerns waiver of attorney-client privilege and work product. In complex litigation, significant amounts of time and effort are expended to preserve the privilege, even when many of the documents are of no concern to the producing party. Parties must be extremely careful, because if a privileged document is produced, there is a risk that a court will find a subject-matter waiver that will apply not only to the instant case and document, but to other cases and documents as well. Moreover, an enormous amount of expense is put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject-matter waiver.

The purpose of Rule 5-502 is to facilitate the production of documents without

[1] Proposed Federal Rule of Evidence 502 is drafted in the form of a statute because the Enabling Act does not permit the Judicial Conference of the United States to amend rules on privilege directly. Federal rules of privilege must be directly enacted by Congress. The Rule is being submitted for public comment before being forwarded in final draft form to Congress for its approval.

risking subject-matter waiver, which in turn, could make the discovery process less expensive. The difficulties of privilege review, risk of inadvertent disclosure, and discovery expense are even greater with respect to discovery of electronically stored information as opposed to traditional paper documents, due not only to the sheer volume of electronically stored information, but also to the concomitant difficulties in reviewing multiple electronic drafts of electronic documents, and potentially, associated metadata. See, *e.g.*, *Hopson v. Mayor and City Council of Baltimore*, 232 F.R.D. 228 (D. Md. 2005) (the cost of responding to a discovery request can be in the millions of dollars if several years' worth of archived e-mail and files must be located, restored, sorted through and claims to remove non-relevant confidential material). Document-by-document, pre-production review for subject matter, with subject-matter waiver as the penalty, can impose cost and time burdens that are completely disproportionate to what is at stake in the litigation. Furthermore, to be effective, any rule concerning information production and waiver must address the issue of waiver not only as to parties to the litigation, but also in relation to non-parties.

The Rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of communications or information covered by the attorney-client privilege or work-product protection. Parties need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable.

The Rule makes no attempt to alter the law on whether a communication or information is protected as attorney-client privilege or work product as an initial matter. Morever, while establishing some exceptions to waiver, the Rule does not purport to supplant applicable waiver doctrine generally.

The Rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in finding a waiver even where there is no disclosure of privileged information or work product. *See, e.g., State v. Thomas*, 325 Md. 160 (1992) (Attorney-client privilege is waived by a client in any proceeding where the client asserts a claim against counsel of ineffective assistance and those communications, and the opinion based upon them, are relevant to a determination of the quality of counsel's performance.) The Rule is not intended to displace or modify common law concerning waiver of privilege or work product where no disclosure has been made.

Section (a). The Rule's coverage is limited to attorney-client privilege and work product. The limitation in coverage is consistent with the goals of the Rule, which is to provide a reasonable limit on the costs of privilege and work product review and retention that are incurred by parties to litigation. This interest arises mainly, if not exclusively, in the context of disclosure of attorney-client privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of common law. Nor does the Rule purport to apply to the Fifth Amendment privilege against compelled self-incrimination.

Section (b). The Rule provides that a voluntary disclosure generally results in a waiver only of the communication or information disclosed; a subject-matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to protect against a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re von Bulow,* 828 F.2d 94 (2d Cir. 1987) (disclosure of privileged information in a book did not result in unfairness to the adversary in a litigation, therefore a subject-matter waiver was not warranted); *In re United Mine Workers*

of America Employee Benefit Plans Litig., 159 F.R.D. 307, 312 (D.D.C. 1994)(waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). The language concerning subject matter waiver – "ought in fairness" – is taken from Rule 5-106, because the animating principle is the same. A party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation. *See, e.g., United States v. Branch,* 91 F.3d 699 (5th Cir. 1996) (under Rule 106, completing evidence was not admissible where the party's presentation, while selective, was not misleading or unfair). The Rule rejects the concept that inadvertent disclosure of documents or information during discovery automatically constitutes a subject-matter waiver.

Section (c). Courts in other jurisdictions are in conflict over whether an inadvertent disclosure of privileged information or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any mistaken disclosure of protected information constitutes waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law. The Rule opts for the middle ground: inadvertent disclosure of privileged or protected information in connection with a state or federal proceeding constitutes a waiver only if the party did not take reasonable precautions to prevent disclosure and did not make reasonable and prompt efforts to rectify the error. This position is in accord with Maryland common law, *see, e.g., Elkton Care Center Associates v. Quality Care Management, Inc.,* 145 Md. App. 532 (2002), and the majority view on whether inadvertent

disclosure is a waiver. *See, e.g.*, *Zapata v. IBP, Inc*., 175 F.R.D. 574, 576-77 (D. Kan. 1997) (work product); *Hydraflow, Inc. v. Enidine, Inc.,* 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-client privilege); *Edwards v. Whitaker,* 868 F.Supp. 226, 229 (M.D. Tenn. 1994) (attorney-client privilege). The Rule refers to "inadvertent" disclosure, as opposed to using any other term, because the word "inadvertent" is widely used by courts and commentators to cover mistaken or unintentional disclosures of information covered by the attorney-client privilege or the work product protection.

Section (d). Confidentiality orders are becoming
increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the information can be used by non-parties to the litigation.

There is some dispute as to whether a confidentiality order entered in one case can bind non-parties from asserting waiver by disclosure in a separate litigation. *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law. The Rule provides that when a confidentiality order governing the consequences of disclosure in that case is entered in a proceeding, according to the terms agreed to by the parties, its terms are enforceable against non-parties in any federal or state proceeding.

For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the Rule contemplates enforcement of "claw-back" and "quick peek"

arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product. As such, the Rule provides a party with a predictable protection that is necessary to allow that party to limit the prohibitive costs of privilege and work product review and retention.

Section (e). Section (e) codifies the well-established proposition that parties can enter into an agreement to limit the effect of waiver by disclosure between or among them. *See, e.g., Dowd v. Calabrese,* 101 F.R.D. 427, 439 (D.D.C. 1984) (no waiver where the parties stipulated in advance that certain testimony at a deposition "would not be deemed to constitute a waiver of the attorney-client or work product privileges"); *Zubulake v. UBS Warburg LLC,* 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents"). Of course, such an agreement can bind only the parties to the agreement. The Rule makes clear that if parties want protection from a finding of waiver by disclosure in a separate litigation, the agreement must be made part of a court order.

Rule 5-502 was accompanied by the following Reporter's Note.

In light of its discussions on electronically stored data, the Discovery Subcommittee recommends that a new rule be added to safeguard against the inadvertent waiver of the attorney-client privilege and work product protection. Based on proposed Federal Rule of Evidence 502, the Rule seeks to provide a predictable, uniform set of standards by which parties can determine the consequences of a disclosure of information protected by the attorney-client privilege or work product doctrine.

Mr. Klein explained that this Rule is new and is derived

from proposed Fed. R. Evid. 502. Rule 5-502 has been reorganized, with the definitions moved to the front of the Rule.

Judge Matricciani pointed out that section (d) governs federal proceedings, also. Mr. Klein said that conceptually the Rule facilitates "clawback agreements." The court approves the clawback agreement, entitling the party to reasonable protection and not being subject to subject matter waiver. The federal courts discussed the question of whether non-parties to the litigation can be bound to the agreement. This issue has not been resolved. The order is persuasive, although not necessarily conclusive.

Mr. Bowen pointed out that subsection (e)(2) of Rule 2-402 refers to "trial-preparation" material, but Rule 5-502 refers to "work product." Mr. Brault commented that the term "work product" is broader, and may include material not prepared for trial. Mr. Klein noted that although the existing Maryland Rule refers to "trial-preparation material," his preference for the term "work product," for consistency with the federal terminology. Judge Matricciani observed that there is a body of case law referring to "work product," but not "trial-preparation material." By consensus, the Committee agreed to use the term "work product" instead of the term "trial-preparation material."

Mr. Brault inquired as to whether section (d) could result in collateral estoppel. The Vice Chair answered that this is not referring to a judgment. Mr. Brault questioned as to whether if a case is settled by a court order, this would bind future cases.

Ms. Ogletree commented that there must be a final judgment for there to be collateral estoppel. The Vice Chair observed that a court order is binding on parties, but the problem is if there are non-parties. Ms. Ogletree remarked that if there is one common party, there can be collateral estoppel. Ms. Potter asked if this issue has to be decided today. Mr. Klein stated that it is important to move forward. There is no evidence rule pertaining to post-production assertion of privilege. The issue of whether inadvertent disclosure of privileged information or work product constitutes a waiver has been decided differently in other jurisdictions. Maryland has adopted a middle ground, determined in *Elkton Care Center Associates v. Quality Care Management, Inc.*, 145 Md. App. 532 (2002) and presented in the Rule: inadvertent disclosure of privileged or protected information in connection with a state or federal proceeding constitutes a waiver only if the party did not take reasonable precautions to prevent disclosure and did not make reasonable and prompt efforts to rectify the error.

Mr. Klein said that Rule 5-502 is almost verbatim the language of Fed. R. Evid. 502, a copy of which is included in the meeting materials. The Vice Chair noted that federal rules are approved by Congress. The Reporter commented that in Maryland, the Rule-making authority of the Court of Appeals is provided by Article IV, §18 (a) of the Maryland Constitution. Mr. Klein remarked that the Reporter had discussed with the Chair of the

Rules Committee whether the provisions of Rule 5-502 can be accomplished by rule. The sentiment is that the provisions do not create a new privilege, which cannot be accomplished by rule; rather, they set out a procedure for exercising an existing privilege. Professor McLain noted that without this Rule, a party can get into deep trouble when providing discovery.

Judge Matricciani questioned whether federal courts would be bound if the Maryland General Assembly passed a similar law. The Vice Chair replied that they would not be. She suggested that the references to federal law should be deleted from the Rule. By consensus, the Committee agreed. Professor McLain noted that the federal courts can defer to the state law of privilege if it does not interfere with federal law. Congress took action by drafting a rule of privilege. Both federal and state laws may be needed.

The Vice Chair suggested that instead of the Rule being a rule of evidence, its provisions should be placed in Title 2, Chapter 400, Discovery, rather than being the only Rule in Title 5, Chapter 500. By consensus, the Committee approved this suggestion. By consensus, the Committee approved the Rule as amended.

Mr. Klein presented Form Interrogatories, Form 3 (General Interrogatories) for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX: FORM INTERROGATORIES

AMEND Form 3 to delete language from Interrogatory No. 3 and to add language to it referring to “electronically stored information,” as follows:

Form 3. General Interrogatories.

Interrogatories

1. **Identify** each **person**, other than a person intended to be called as an expert witness at trial, having discoverable information that tends to support a position that you have taken or intended to take in this action, including any claim for damages, and state the subject matter of the information possessed by that **person**. (Standard General Interrogatory No. 1.)

2. **Identify** each **person** whom you expect to call as an expert witness at trial, state the subject matter on which the expert is expected to testify, state the substance of the findings and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and, with respect to an expert whose findings and opinions were acquired in anticipation of litigation or for trial, summarize the qualifications of the expert, state the terms of the expert’s compensation, and attach to your answers any available list of publications written by the expert and any written report made by the expert concerning the expert’s findings and opinions. (Standard General Interrogatory No. 2.)

3. If you intend to rely upon any **documents**, electronically stored information, or ~~other~~ tangible things to support a position that you have taken or intend to take in the action, including any claim for damages, provide a brief description, by category and location, of all such **documents**, electronically stored information, and ~~other~~ tangible things, and **identify** all **persons** having possession, custody, or control of them. (Standard General Interrogatory No. 3.)

4. Itemize and show how you calculate any economic damages claimed by you in this action, and describe any non-economic damages claimed. (Standard General Interrogatory No.4.)

5. If any **person** carrying on an insurance business might be liable to satisfy part or all of a judgment that might be entered in this action or to indemnify or reimburse for payments made to satisfy the judgment, **identify** that **person**, state the applicable policy limits of any insurance agreement under which the **person** might be liable, and describe any question or challenge raised by the **person** relating to coverage for this action. (Standard General Interrogatory No. 5.)

. . .

Form 3 was accompanied by the following Reporter's Note.

The proposed amendments to Form 3, General Interrogatories, conform the Form to terminology used in the proposed amendments to the Rules in Title 2, Chapters 400 and 500, recommended by the Discovery Subcommittee.

There being no comment, the Committee approved the proposed changes as presented.

The Vice Chair adjourned the meeting.